LIST OF AUTHORITIES

CASES	PAGE
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 679	19
Champlin Refining Company v. Corporation Commission, 286 U.S. 210	14, 15, 17
Chicago, Milwaukee & St. Paul Ry. Co. v. Polt, 232 U.S. 165	20
Connally v. General Construction Company, 269 U.S. 385	15, 17
Cramp v. Board of Public Instruction of Orange County, Florida (Dec. 11, 1961), —U.S.—, 82 S.Ct. 274	15
Ex Parte Young, 209 U.S. 123	20
Grannis v. Ordean, 234 U.S. 385	11
Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 367	11
Halbouty v. Darsey, 326 S.W.2d 528 (Tex.Civ.App., writ ref., N.R.E.)	2, 7, 11, 13, 14, 21
Halbouty v. Railroad Commission, 357 S.W.2d 364	1, 2
Humble Oil & Refining Co. v. Cook, et al., 215 S.W.2d 383, 386 (Tex.Civ.App., writ ref., N.R.E.)	21
Humble Oil & Refining Co. v. Railroad Commission, 94 S.W.2d 1197, 1198 (Tex.Civ.App., writ ref.)	21
Humble Oil & Refining Company v. Railroad Commission, 331 U.S. 791	6
Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U.S. 313	11
Missouri Pacific Ry. Co. v. Tucker, 230 U.S. 340	20
Northern Ohio Traction & Light Co. v. State of Ohio, 245 U.S. 574	21
Oklahoma Operating Co. v. Love, 252 U.S. 331	20
Panama Refining Co. v. Ryan, 293 U.S. 388	15
Patterson v. Stanolind Oil & Gas Co., 305 U.S. 376	16
Railroad Commission v. Humble Oil & Refining Co., 311 U.S. 578	6
Railroad Commission v. Humble Oil & Refining Co., 193 S.W.2d 824 (Tex.Civ.App., writ ref., N.R.E.), aff. Humble Oil & Refining Co. v. Railroad Commission and Williams v. Railroad Commission, 331 U.S. 791	6
Railroad Commission v. Rowan & Nichols Oil Co., 310 U.S. 573	6
Railroad Commission v. Rowan & Nichols Oil Co., 311 U.S. 570	6
Saunders v. Shaw, 244 U.S. 317	2, 11, 12

CASES

	PAGE
Smith v. Ames, 169 U.S. 466	21
St. Louis, Iron Mountain & Southern Ry. Co. v. Wynne, 224 U.S. 354	20
Sterling v. Constantin, 287 U.S. 378	15, 16
Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55	15
United Railways & Electric Co. of Baltimore v. West, 280 U.S. 234	21
Williams v. Railroad Commission, 331 U.S. 791	6

UNITED STATES STATUTES

28 U.S.C. 1257(3)	2

REVISED CIVIL STATUTES OF TEXAS

Article 6008b, Section 1	11, 16
Article 6014, par. (g)	11, 16

TEXTS

Myers, "The Law of Pooling and Unitization", Sec. 15.33, pp. 592-627	18
5 Summers, "The Law of Oil and Gas", pp. 239, 246	18

MISCELLANEOUS

Oklahoma Statutes Annotated, Title 52, Chap. 3, Secs. 287.1-287.15	18

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

H. L. DILLON, JR., ET AL., *Petitioners*

v.

MICHEL T. HALBOUTY, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To The Honorable Supreme Court of The United States:

Petitioners, H. L. Dillon, Jr., Roger L. Bauman, J. H. Cordell, John Hill, John Marshall, John W. Pace, Gray Oil Company, a partnership composed of E. J. Gray, and Eddie V. Gray, and J. C. Barnes, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered in this case.

OPINIONS BELOW

The opinions in the Supreme Court of Texas in this case have not yet been officially reported. The majority opinion is unofficially reported in *Halbouty v. Railroad*

Commission, 357 S.W. 2d 364, and is copied, Appendix "A", infra, p. 25. The dissenting opinion of Associate Justice Smith on rehearing is reported in 357 S.W. 2d 376, and is copied, Appendix "B", infra, p. 49.

The opinion in the companion case of *Halbouty v. Darsey*, reported in 326 S.W. 2d 528 (Tex. Civ. App., writ refused, no reversible error, by the Texas Supreme Court), is copied, Appendix "C", infra, p. 64.

JURISDICTION

(1) The judgment of the Supreme Court of Texas sought to be reviewed was dated and entered February 14, 1962. The Supreme Court of Texas is the highest court in Texas in which a decision herein can be had.

(2) The date of the order of the Supreme Court of Texas overruling petitioners' motion for rehearing is May 23, 1962. The judgment of the Supreme Court of Texas is therefore a final judgment. This petition is being filed within the time provided by United States Code, Title 28, Section 2101(c).

(3) The statutory provision believed to confer jurisdiction on this Court to review the judgment of the Supreme Court of Texas by writ of certiorari is United States Code, Title 28, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

(1) Are petitioners' rights under the due process clause of the Fourteenth Amendment to the United States Constitution (which, as construed in *Saunders v. Shaw*, 244 U.S. 317, requires that petitioners be granted a hearing on material issues) violated by the decision of the Supreme Court of Texas rendering judgment against petitioners instead of remanding the case to the trial court to allow

petitioners to controvert evidence as to offers to unitize their leases with other properties, because petitioners have not had a chance to offer their evidence on this issue, since the trial court ruled evidence on this issue to be immaterial and it was first considered to be material by the Texas Supreme Court in its decision in this case? (This question was presented to the Texas Supreme Court by petitioners' assignment of error No. 12 in their Motion for Rehearing copied, Appendix "D", infra, p. 73).

(2) Are petitioners' rights under the due process clause of the Fourteenth Amendment to the United States Constitution violated by the judgment of the Texas Supreme Court cancelling the proration order of the Railroad Commission involved in this case (which order would have permitted petitioners to produce from their wells a sufficient amount of gas to repay drilling and production costs and provide only a reasonable profit), on the ground that petitioners are not entitled to produce from their wells such an amount of gas if petitioners "were offered unitization which would afford them a fair share of the mineral proceeds from a common source," because there is no statute in Texas authorizing or providing any procedure for compulsory unitization of separate tracts and there is not any statutory or other reasonably definite legal standard by which the fairness or validity of an offer of unitization can be determined? (This question was presented to the Texas Supreme Court by petitioners' assignment of error No. 14 in their Motion for Rehearing, copied, Appendix "D", infra, p. 74).

(3) Are petitioners' rights under the due process clause of the Fourteenth Amendment of the United States Constitution (which guarantees that petitioners will not be deprived of their property without a fair hearing) vio-

lated by the judgment of the Texas Supreme Court, because no procedure is provided for any prior judicial or other fair hearing on the complex questions of the fairness and validity of unitization offers and any hearing that may be granted will be only after petitioners have decided to reject the offers to unitize and in such a hearing the penalty against petitioners for having guessed wrong will be the confiscation of petitioners' investments in wells which petitioners have already drilled? (This question was presented to the Texas Supreme Court by petitioners' assignment of error No. 13 in their Motion for Rehearing, copied, Appendix "D", infra, p. 73).

(4) Are petitioners' rights under the due process clause of the Fourteenth Amendment to the United States Constitution (which guarantees that the petitioners will be given rates or allowables that provide petitioners a fair return on their investments made under state franchises) violated by the decision of Texas Supreme Court, which cancelled the 1/3 - 2/3 proration order and denied to petitioners the right to an allowable sufficient to give them any return on their investments made under the Texas Railroad Commission's Rule 37 permits? (This question was presented to the Texas Supreme Court by petitioners' assignments of error Nos. 16 and 17, in their Motion for Rehearing, copied, Appendix "D", infra, p. 75).

CONSTITUTIONAL PROVISION, TEXAS STATUTES, AND RAILROAD COMMISSION ORDER INVOLVED

The constitutional provision involved is the second sentence of Section 1 of the Fourteenth Amendment to the Constitution of the United States. See Appendix "E", infra, p. 76.

The Texas statutes involved are Articles 6008, 6008b, and 6014, Vernon's Texas Civil Statutes, the pertinent parts of which are copied, Appendix "E", infra, p. 76.

The order of the Railroad Commission involved is Oil and Gas Docket No. 128-#3-38,395, dated August 18, 1958, entitled "Special Order Adopting Rules and Regulations for the Port Acres (Lower Hackberry) Field, Jefferson County, Texas," of which the pertinent part is Rule 3, copied, Appendix "E", infra, p. 81.

STATEMENT OF THE CASE

1. Preliminary Statement

There is no question of waste or conservation, as usually understood, involved in this case. This case only involves the question of correlative rights between the big tract operators on one hand and the small tract operators on the other hand. The Texas Supreme Court reversed and rendered the judgment of the trial court which had sustained the gas proration order of the Texas Railroad Commission, the Texas Supreme Court holding that, because there was an indication in the record by bill of exception that petitioners had been offered the rights to unitize or pool their lands with the respondents' properties, this was not a proper case for the Railroad Commission to allow the petitioners, small tract operators, to recover a sufficient amount of gas to repay drilling and production costs and provide a reasonable profit, and that the Railroad Commission's 1/3 per well - 2/3 acreage proration rule for the Port Acres Field was therefore invalid. The operational effect of the Texas Supreme Court's decision is that the Railroad Commission's proration rules, allocating allowables 1/3 per well - 2/3 acreage for gas fields and ½ per well - ½ acreage for oil fields, in many oil and gas fields in Texas,

involving thousands of operators and investors, have been declared invalid, and that small tract owners' investments, running into millions of dollars, are subject to confiscation for the benefit of large tract operators, if the small tract owners have guessed wrong on whether they must accept offers to unitize their small tracts with the big tracts.

2. Summary of Proceedings in Texas Courts

The respondents, Michel T. Halbouty, Meredith and Company, Peter Henderson Oil Company, and Pan American Petroleum Corporation, are the operators of large producing units in the Port Acres Field. They brought this suit against the Texas Railroad Commission to cancel the proration order for the field, attacking the part of the allocation formula which provided that 1/3 of the allowable production should be allocated equally among the individual wells on the ground that gas wells completed on small tracts were thereby permitted to produce gas in excess of the gas in place beneath such tracts and that such excess was drained from the large units.[1]

---

1 The same contentions were unsuccessfully urged against proration orders of the Railroad Commission of Texas assigning much larger portions of the allowable production on a per-well basis in **Railroad Commission v. Rowan & Nichols Oil Co.**, 310 U.S. 573; **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U.S. 570; **Railroad Commission v. Humble Oil & Refining Co.**, 311 U.S. 578; **Railroad Commission v. Humble Oil & Refining Co.**, 193 S.W.2d 824 (Tex.Civ.App., writ refused, no reversible error), affirmed in **Humble Oil & Refining Co. v. Railroad Commission and Williams v. Railroad Commission**, 331 U.S. 791. In the last of these cases, known as the **Hawkins** case because it involved the Hawkins oil field, the Texas court had emphatically upheld the right of small tract owners to allowables which would permit them to be "drilled and operated at a reasonable profit," (see 193 S.W.2d at 832) although "substantial uncompensated excess drainage" from the large tracts was conceded. (See 193 S.W.2d at 829).

The petitioners, H. L. Dillon, Jr., et al., intervened in the suit in defense of the Railroad Commission's order. Petitioners are the owners and operators of gas wells drilled upon small units in the Port Acres Field. Petitioners' wells were drilled under permits granted by the Railroad Commission, each well being drilled upon a separately owned tract. The validity of the orders of the Railroad Commission granting the drilling permits to the petitioners was not attacked in this suit, their validity having been settled by the decision in the companion case of *Halbouty v. Darsey*, 326 S.W. 2d 528 (Tex. Civ. App., writ refused, no reversible error, by Texas Supreme Court). See Appendix "C", infra, 64.

Evidence at the trial showed that there were then twenty-five gas wells drilled on large units or tracts and twenty-two gas wells drilled upon small tracts containing 5 acres or less. The evidence further showed, as recited in the opinion of the Texas Supreme Court, that each of the wells drilled upon a small tract, under the 2/3 acreage - 1/3 per well allocation formula, would have a total gross income from production of gas, to the end of its productive life, of approximately $407,501.00, that the total cost of each of such wells, including drilling, operating, and royalty expenses, would be approximately $361,674.00, leaving a net income above such expenses over the entire productive life of each well in the amount of approximately $45,827.00. On the other hand; it was shown that if the allocation formula was changed so as to eliminate the well factor and the entire field allowable was divided on the basis of the acre feet of producing sand beneath each producing unit, then the total gross income from production of gas from each well on a small tract would be only approximately $50,867.00. It was the

position of petitioners at the trial that the Railroad Commission's proration order was reasonable and valid, in that it properly took into account petitioners' right to develop each separately owned tract by drilling a well thereon, and that the portion of the allocation formula, dividing 1/3 of the total allowable production equally among the wells, resulted in the assignment to petitioners' wells of no more allowable production than was reasonably necessary to pay for drilling and operating costs and provide a reasonable profit.

During the trial, respondents Halbouty and Peter Henderson Oil Company sought to introduce in evidence portions of the transcript of the hearing before the Railroad Commission of Texas in which those respondents made offers to unitize their leases with small tracts upon which drilling permits had been granted. (S.F. 637, 644, 668)[2] Petitioners objected to the admission of evidence regarding such offers to unitize on the ground that such evidence was immaterial, because the owners of small tracts had a right as a matter of law to develop their tracts separately and such right could not be affected or limited by an offer of unitization on the part of another operator. (S.F. 638-644) The trial court sustained the objection (S.F. 644, 668) and such tendered evidence was included in the record only for the purpose of bills of exception to the trial court's ruling. (S.F. 644-645, 668)

The District Court having ruled that evidence regarding offers to unitize was immaterial, no evidence on that question was offered by the petitioners at the trial.

---

[2] "S.F." references are to the Statement of Facts, being the stenographic report of the proceedings and evidence heard in the trial court, which by order of the Texas Supreme Court has been transmitted to this Court in original form.

The District Court entered judgment upholding the proration order of the Railroad Commission, adjudging it to be a valid and reasonable order, and denying respondent all relief. Appendix "F", infra, p. 82.

Upon direct appeal of this case, the Texas Supreme Court considered the evidence offered in the bills of exception regarding the offers to unitize, and held that because of such offers, petitioners were not in a position to complain because of the heavy financial loss which would result to them from a striking down of the 1/3 - 2/3 allocation formula contained in the Railroad Commission's proration order. The Supreme Court reversed the judgment below, one judge dissenting. (Appendix "G", infra, p. 87) However, the Texas Supreme Court did not remand the case to the District Court for a new trial, so that the question of offers to unitize could be developed and petitioners could have the opportunity to answer or explain evidence which respondents had tendered but which had been excluded by the District Court. Instead, the Texas Supreme Court rendered judgment against petitioners, cancelling the portion of the Railroad Commission's order allocating the allowable production on a 2/3 acreage - 1/3 per well basis. The concluding paragraphs of the opinion of the Texas Supreme Court are as follows (See Appendix "A", infra, pp. 47-48):

> "So far as the appellees' complaint that a striking down of the 1/3-2/3 formula would probably entail heavy financial loss to them, it may be said that they drilled their wells at their own risk. There is some indication in the record by bill of exception that they were offered unitization that would prevent confiscation and afford to them a fair share of the mineral proceeds from the common source. While the

statute does not compel unitization, nevertheless it does expressly authorize that procedure subject to the approval of the Railroad Commission, Art. 6008b, V.A.C.S. It is to be reemphasized that their permits were granted for the purpose of avoiding confiscation of the minerals underlying their properties and not for the purpose of enabling them to drain the minerals underlying adjoining lands to pay the cost of their operations plus profits. This does not mean and we are not to be understood as foreclosing the power of the Commission, by proper order or exception, to allow the holder of a Rule 37 permit[3] to recover a sufficient amount of oil or gas to repay drilling and production costs and provide a reasonable profit when no other means of recovering the minerals which underlie his land are available. No such problem is before us.

"From the foregoing it follows that the 1/3-2/3 proration formula as applied by the Commission in the Port Acres Field is invalid in that it does not afford an opportunity to all of the parties to produce and save their fair share of the minerals or their equivalent. We hold that it is not reasonably supported by substantial evidence.

"The judgment of the trial court is reversed and judgment rendered for appellants."

The decision of the Texas Supreme Court, considering offers to unitize as material to the question of how much gas petitioners should be allowed to produce, was unexpected. In the companion case of *Halbouty v. Darsey*,

[3] The reference is to a drilling permit granted by the Railroad Commission to the lessee of a small tract which is not of such dimensions as to make it possible to drill a well at the distances from the property lines required by the spacing rule. Petitioners' wells were all drilled under such permits.

326 S.W. 2d 528 (Tex. Civ. App., writ refused, no reversible error, by Texas Supreme Court), it had been held, following numerous earlier Texas decisions, that offers to unitize did not prevent the Railroad Commission from granting the owners of small tracts in the Port Acres Field permits to drill on their tracts, even though such wells would drain large quantities of gas from adjacent tracts. See Appendix "C", infra, pp. 68-71.

In due time petitioners filed their motion for rehearing in which they urged the federal constitutional questions which are presented in this petition. See Appendix "D", infra, p. 73. The Texas Supreme Court overruled this motion. See Appendix "H", infra, p. 89. The assertion of the federal questions in the motion for rehearing in the Texas Supreme Court was sufficient and timely. *Saunders v. Shaw*, 244 U.S. 317; *Missouri ex rel. Missouri Insurance Co. v. Gebner*, 281 U.S. 313; *Grannis v. Ordean*, 234 U.S. 385; *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 367.

While the majority of the Supreme Court of Texas did not write an opinion in overruling petitioners' Motion for Rehearing, Mr. Justice Smith, who was the second judge to disagree with the majority, wrote a dissenting opinion. See Appendix "B", infra, p. 49. The dissenting opinion point out (1) that the right of separate development of small tracts, theretofore unquestioned in Texas decisions, was destroyed and made futile by the majority decision that an offer to unitize, indicated by a bill of exception in the record in this case, required the Railroad Commission to deny a living allowable to wells drilled on separate small tracts, (2) that while the Texas statutes, Articles 6008b, Section 1, and Article 6014, paragraph (g), prohibit compulsory pooling, the majority opinion requires the Railroad

Commission to accomplish indirectly what they are forbidden to do directly, without any statutory procedure or standards being prescribed, (3) that the effect of the majority decision is to put the small tract owners at the mercy of large unit operators, since no definite standards are given for deciding the complex questions involved in unitization, and (4) that the majority decision, requiring the Railroad Commission to cut the allowables of petitioners' wells to where they can recover only a small fraction of their cash investment will mean the uncompensated loss to petitioners of millions of dollars in drilling costs alone.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. In refusing to remand the case for a new trial so that petitioners might have an opportunity to present their evidence on an issue which it considered to be material in determining the amount of production which the Railroad Commission of Texas could lawfully assign to petitioners, the Texas Supreme Court has denied to petitioners due process of law and has thereby deprived them of their property in violation of the Fourteenth Amendment to the United States Constitution. The holding of the Texas Supreme Court is in conflict with the decision of this Court in *Saunders v. Shau*, 244 U.S. 317.

In *Saunders v. Shau*, supra, as in this case, evidence, which was excluded on objection by the trial court, was considered by the State Supreme Court, which entered judgment based on such excluded evidence. The party who had made the objection to the evidence in the trial court and who had not offered any evidence on that issue because of the trial court's ruling that the evidence was inadmissible brought the case to this Court asserting "that

he had been deprived of due process of law; contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence." Upholding this position, this Court said (244 U.S. at 319, 320):

> "Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. . . . Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the cas was within the principle of the Myles Salt Co. Case that to remand it would be an empty form, —a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.
>
> * * * *
>
> "The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation."

The ruling of the Texas Supreme Court in this case regarding the materiality of evidence of offers to unitize was the first time that such a holding had been made by any Texas court. The Court overturns what was regarded as settled law, for example, in the companion case of *Halbouty v. Darsey*, 326 S.W. 2d 528 (Tex. Civ. App., writ

refused, no reversible error, by Texas Supreme Court). See Appendix "C", infra, p. 64. That case was followed by the trial court in this case. Since the Texas Supreme Court has now decided that the law is otherwise, simple justice requires that petitioners, who have had no opportunity to present their side of the facts relating to the issue of unitization, should at least be granted a new trial in which they may offer their controverting evidence. The Texas Supreme Court has denied to petitioners their day in court, holding that as a matter of law petitioners have no right to complain because their investments, running into millions of dollars, will be destroyed. It is submitted that petitioners have plainly been denied due process of law.

2. The judgment of the Texas Supreme Court in this case requires the Railroad Commission of Texas, as a matter of law, to place stringent limitations upon the production by petitioners of gas from wells on their own separate gas leases, depending on whether or not petitioners "were offered unitization that would prevent confiscation and afford them a fair share of the mineral proceeds from the common source," but the Texas Supreme Court does not point out any statutory procedure or any reasonably definite or ascertainable standard by which it could be determined whether petitioners must accept such offers to unitize or run the risk of large financial losses if they decide to develop their properties separately. In placing this vague and ambiguous limitation upon the use by petitioners of their property, the Texas Supreme Court has deprived petitioners of their property without due process of law in violation of the Fourteenth Amendment. The decision of the Texas Supreme Court is in conflict with the principles announced and applied in *Champlin Refining Company v.*

Corporation Commission, 286 U.S. 210; *Sterling v. Constantin*, 287 U.S. 378; *Panama Refining Co. v. Ryan*, 293 U.S. 388; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55; *Connally v. General Construction Company*, 269 U.S. 385; *Cramp v. Board of Public Instruction of Orange County, Florida* (December 11, 1961), —U.S.—, 82 S. Ct. 274.

The property rights of the owners of oil and gas lands in Texas, under the common law of this state, were succinctly and accurately stated by Mr. Justice Brandeis in the opinion of this Court in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 68:

> "Under it, the owner of land has title to oil and gas in place and, likewise, to the oil and gas which migrate to formations under his land through drainage from other lands. Under that rule, he may produce all the oil and gas that will flow out of the well on his land, subject to the exercise by other landowners of the same right of capture through drilling offsetting wells, so as to get their full share. This common-law rule, declared in an unbroken line of authorities, has been widely applied."

While the State of Texas through the reasonable exercise of its police power may regulate the common-law property rights of the owners of oil and gas lands for the purpose of conserving these natural resources, and concededly may regulate the drilling of gas wells and the amount of gas they may produce, in doing so the state must respect the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution. In striking down an attempt by the Governor of Texas to limit arbitrarily, and subject to no ascertainable standard, the pro-

duction of oil in the East Texas Field, this Court said in *Sterling v. Constantin*, 287 U.S. 378, 396:

> "The existence and nature of the complainants' rights are not open to question. Their ownership of the oil properties is undisputed. Their right to the enjoyment and use of these properties, subject to reasonable regulation by the state in the exercise of its power to prevent unnecessary loss, destruction, and waste, is protected by the due process clause of the Fourteenth Amendment."

It may be assumed that the Legislature of Texas could have compelled petitioners to unitize their tracts with adjoining owners by passing a statute establishing a procedure and setting out definite standards for unitization, to be enforced by some agency of the state, such as the Railroad Commission. Such a statute, adopted by the Oklahoma legislature, was upheld in *Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376. The Texas legislature, however, has never seen fit to pass any such statute. The Texas Supreme Court in its opinion in this case concedes that "the statute does not compel unitization." Actually, the legislature has positively stated that the policy of the state is that no owner of oil or gas property shall be compelled to unitize or pool his property with the property of others. Section 1 of Article 6008b, *Vernon's Texas Civil Statutes* (Appendix "E", infra, p. 80), authorized unitization by voluntary agreement, but it expressly provides that "no person shall be compelled or required to enter into" a pooling or unitization agreement, and Article 6014, paragraph (g), *Vernon's Texas Civil Statutes* (Appendix "E", infra, p. 81), expressly provides that it is not the intent of the statute to require that "the separately owned properties in any pool be unitized under one management, control or ownership."

The substance and effect of the holding of the Texas Supreme Court in this case is that, in spite of express statutory provisions to the contrary, the Railroad Commission must exercise an implied authority to compel unitization indirectly by making it economically impossible for an owner of a small tract to develop his own separate tract independently, if he receives a "fair" offer to unitize his tract with other tracts. The decision of the Texas Supreme Court in this case is in conflict with the decisions of this Court holding that the regulation of property rights must not be on a basis which is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." See *Connally v. General Construction Company*, 269 U.S. 385, 391. The standard of "fairness" indicated by the opinion of the Texas Supreme Court in this case is far more vague and indefinite than the standards which were stricken down by this Court, as being in violation of the due process clause, in *Champlin Refining Company v. Corporation Commission*, 286 U.S. 210. In the *Champlin* case, there was at least an express statutory provision attempting to fix a standard, but this Court held that such standard was so ambiguous and indefinite as to constitute no guide or standard at all, and therefore that the attempted regulation was unconstitutional (286 U.S. at 243):

> "In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

In the present case, the statute makes no provision at all for compulsory pooling or unitization; to the contrary, the statutes expressly prohibit compulsory pooling or unitization. The authority to compel unitization by indirection is conferred on the Railroad Commission simply by the decision of the Texas Supreme Court in this case. The opinion of the Court gives no definite or ascertainable standard or rule whereby the fairness of a proposal to pool or unitize can be determined.

The matter of unitizing separately owned tracts within a common oil or gas reservoir is a complex and not a simple matter. For an illustration of the different factors properly to be considered in compelling the unitization of separate tracts, see the compulsory unitization statute of Oklahoma, Title 52, Chapter 3, Sections 287.1-287.15, *Oklahoma Statutes Annotated*, copied in the 1961 pocket part to Volume 5, Summers, "The Law of Oil and Gas," pages 239-246. For a plan of unitization, see the document copied in Myers, "The Law of Pooling and Unitization," Section 15.33, pages 592-627. It is obvious, from an examination of the Oklahoma statute and the unitization plan cited for purposes of illustration, that there is much room for wide differences of view as to what is "fair" in a unitization plan. Unless some legal procedure and some definite standards are legally provided, there will be no limitations on arbitrary action nor any guides by which the owners of small tracts can ascertain what their right would be.

Petitioners are just as much entitled to protection under the due process clause of the Fourteenth Amendment against a judgment of the court, reading into a statute a provision confiscating petitioners' property, as they are entitled to be protected against a statute expressly making

such provision. In *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673 and 679, this Court said:

> "If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. . . . The violation is nonetheless clear when the result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."

3. The decision of the Texas Supreme Court is that petitioners drilled their wells "at their own risk" and that because petitioners guessed wrong on whether they should accept offers to unitize or go ahead and develop their tracts separately, they cannot complain because the striking down of the 1/3-2/3 formula will "entail heavy financial loss to them." See Appendix "A", infra, p. 47.

As we have pointed out, the Texas Supreme Court has denied a hearing to petitioners on the issue of unitization and has provided no definite standard whereby that issue could be determined. But even if a hearing may be granted and a standard can be assumed, still a state-imposed restriction on the use of petitioners' property which provides no procedur for a prior determination and puts on petitioners the burden of defending and justifying their decision against unitization at the risk of losing huge investments, denies to petitioners due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. A hearing where petitioners must run the risk of having their property confiscated if they guessed

wrong does not meet the tests of a fair hearing. There was no way whereby petitioners could get a judicial determination in advance as to whether they were right in deciding to spend millions of dollars in drilling their wells. A hearing only after such investment has been made, under the extreme peril of such heavy losses if the Court finds that petitioners guessed wrong, is in actual effect a denial of a fair hearing. For this additional reason the petitioners have been denied due process, under the principles announced and applied in *Oklahoma Operating Co. v. Love*, 252 U.S. 331; *Ex parte Young*, 209 U.S. 123; *Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165; *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340; *St. Louis, Iron Mountain & Southern Ry. Co. v. Wynne*, 224 U.S. 354.

4. The holding of the Texas Supreme Court that the proration order of the Railroad Commission of Texas for the Port Acres Field is invalid, because small tract operators who have drilled wells under valid Railroad Commission permits in the field are not entitled to a rate or an allowable sufficient to provide them with any return on their investment, and that this is not a case in which the Railroad Commission can allow them a fair return on their investments that will enable them to get back their drilling costs, operating expenses, and only a reasonable profit within a reasonable time, is in violation of and contrary to the due process clause of the Fourteenth Amendment of the United States Constitution, which requires that when a regulatory body sets a return on an investment which has been authorized by a franchise or Railroad Commission permit, the return must be sufficient to pay costs and give a fair return on the investment.

The petitioners drilled under permits in the Port Acres Field, which have been validated and specifically upheld as necessary to prevent confiscation against the contention that they will under the 1/3-2/3 rule drain adjoining tracts in order to get a fair return on well investments. *Halbouty v. Darsey*, 326 S.W. 2d 528 (Tex. Civ. App., writ refused, no reversible error, by Texas Supreme Court). See Appendix "C", infra, p. 64.

The permits granted by the Railroad Commission to the petitioners to drill wells on their small tracts were in effect franchises which were accepted by petitioners' drilling wells thereon, and entitled the petitioners to produce gas from said wells under reasonable rules by the Railroad Commission. See *Humble Oil & Refining Co. v. Railroad Commission*, 94 S.W. 2d 1197, 1198 (Tex. Civ. App., writ of error refused by Texas Supreme Court); *Humble Oil & Refining Co. v. C. C. Cook, et al.*, 215 S.W. 2d 383, 386 (Tex. Civ. App., writ refused, no reversible error, by Texas Supreme Court).

The setting of rates or allowables so low that the petitioners cannot recover but a small fraction of their investment is confiscation of their permits and of their investments. See *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340; *United Railways & Electric Co. of Baltimore v. West*, 280 U.S. 234; *Smith v. Ames*, 169 U.S. 466.

The attempted withdrawal of said permits indirectly, by setting the allowables so low that the wells could not be operated at a profit, conflict with the due process clause and with the principles announced in *Northern Ohio Traction & Light Co. v. State of Ohio*, 245 U.S. 574, and cases cited therein.

CONCLUSION

Petitioners recognize that this Court is not concerned with the correctness of the construction by the Texas Supreme Court of Texas statutes or even with its overturning of rules of property in oil and gas that were long regarded in Texas as settled law. Petitioners accept, as they must, the decision of the majority of the Texas Supreme Court as final on matters within the state's exclusive control. Petitioners' complaint here is that the direct result of that decision is that petitioners have had huge investments confiscated without due process, in violation of their rights under the Fourteenth Amendment to the United States Constitution, in that:

(1) petitioners have been denied a hearing on the crucial issue of unitization;

(2) no statutory or other reasonably definite standard is provided to determine whether offers of unitization must be accepted or rejected, leaving petitioners at the mercy of their competitors or subject to purely arbitrary decisions by state agencies;

(3) any hearing that may be allowed would not be a fair hearing, because it would be at the peril of having huge investments destroyed if a wrong guess has been made in rejecting offers to unitize, and

(4) petitioners' investments of millions of dollars, made under valid permits issued by the Texas Railroad Commission, will be destroyed because the allowable production will be fixed so low as to make it impossible even to pay drilling and operating costs, much less any profit.

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be granted, and that the judgment of the Texas Supreme Court be reversed.

Respectfully submitted,

BLALOCK, LOHMAN & BLALOCK
2426 Gulf Building
Houston, Texas

WALLACE H. SCOTT, JR.
Perry-Brooks Building
Austin, Texas

LEVERT J. ABLE
1001 - 714 Main Building
Houston, Texas

HART AND HART
JAMES P. HART
904 Brown Building
Austin, Texas
Attorneys for Petitioners, H. L. Dillon, Jr., Et Al.

Of Counsel:

Levert J. Able

James P. Hart

I, Levert J. Able, attorney for Petitioners, depose and say that I have served copies of the foregoing Petition for Writ of Certiorari and the Appendix thereto, by mailing the same by United States Mail, Certified Mail, Return

Receipt Requested to the following counsel of record in said cause:

Cecil N. Cook
James D. Smullen
P. O. Box 2200
Houston, Texas

John J. McKay
Perry-Brooks Building
Austin, Texas

Frank J. Scurlock
2400 Republic National
Bank Bldg.,
Dallas, Texas

Houghton Brownlee, Jr.
Assistant Attorney General
Capitol Station
Austin, Texas

Linward Shivers
Assistant Attorney General
Capitol Station,
Austin, Texas

Harry R. Jones
L. E. Frazier
22nd Floor, Gulf Building
Houston, Texas

Levert J. Able

SUBSCRIBED AND SWORN to before me on this the 14 day of August, A. D. 1962.

J. Brunson

Notary Public in and for
Harris County, Texas

APPENDIX "A"
Majority Opinion of the Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

NO. A-8200

MICHEL T. HALBOUTY, et al., Appellants,	§	On Direct Appeal
vs.	§	from Travis
RAILROAD COMMISSION OF TEXAS, et al.,	§	County.
Appellees.	§	

Michel T. Halbouty and others bring this direct appeal from a decree of the trial court upholding certain orders of the Railroad Commission of Texas and denying to the appellants a permanent injunction and all other relief prayed for.

In the trial court the appellants sought to restrain the Railroad Commission from continuing in effect the allocation formula adopted August 18, 1958, for the Port Acres Field in its order # 3-38,395 which reads as follows:

> "RULE 3. The daily allowable production of gas from individual wells completed in a non-associated gas reservoir of the subject field shall be determined by allocating the allowable production, after deductions have been made for wells which are incapable of producing their gas allowables, among the individual wells in the following manner:
>
> "(a) Two-thirds (2/3) of the allowed gas production from a non-associated gas reservoir shall be allocated to the individual wells completed therein in that proportion that the acreage assigned to each such well bears to the sum of the acreage in the reservoir.

"(b) One-third (1/3) of the allowed gas production from a non-associated gas reservoir shall be allocated equally among the individual wells completed therein.

"(c) The total daily non-associated gas allowable for each well shall be the sum of its acreage and per well allowables."

They also prayed that the Commission be further enjoined from allowing the marketing of gas from the Port Acres Field until the Commission required the operators in the field to maintain the pressure at such point as would permit the maximum recovery of hydrocarbons contained in the reservoir and to prevent unnecessary waste of those natural resources.

The trial court sustained exceptions to the pleadings in so far as they were directed to the refusal of the Railroad Commission to enter the compulsory cycling and pressure maintenance order and found and concluded that the order of the Commission otherwise complained of was reasonably sustained by substantial evidence and is lawful and valid.

At the outset the Railroad Commission and the other appellees vigorously challenge our jurisdiction of this direct appeal on the ground that such appeal will lie only where the purpose of the suit is to restrain action or threatened action on the part of the Commission and not when the object of the suit is to compel action. In other words they say that the real purpose and object of this suit is to compel the Railroad Commission to enter a new proration order and to order cycling and pressure maintenance in the Port Acres Field.

To support their position in this respect they rely on our decision in Boston v. Garrison, 152 Tex. 253, 256

S.W. 2d 67. That suit as first filed sought to restrain the officials of the Department of Public Safety from suspending a chauffeur's license. Prior to the trial the license had expired and plaintiff, by an amendment to his petition, sought to compel the department to renew the old or issue a new license. We held that a direct appeal would not lie in that respect and that his only redress was in the nature of a mandamus. We did not hold that we would not have jurisdiction of the appeal from the refusal of the trial court to restrain the department from suspending the license but that matter had become moot.

In the case here the appellants assert that the proration formula of one-third and two-thirds is unjustified, unreasonable and invalid and of that issue we do have jurisdiction. Incidentally, a striking down of this proration order would, in the natural course of things, enjoin upon the Railroad Commission the duty to write a new order, but it is not within the scope of our jurisdiction here to direct the Commission in that regard. What we have before us is the validity vel non of the order as written. Railroad Commission v. Sterling Oil & Refining Co., 147 Tex. 547, 218 S.W. 2d 415; Board of Water Engineers v. Colorado River Municipal Water District, 152 Tex. 77, 254 S.W. 2d 369; Texas & N.O. Ry. Co. v. Railroad Commission, 155 Tex. 323, 286 S.W. 2d 112; Railroad Commission v. Shell Oil Co., 146 Tex. 286, 206 S.W 2d 235.

Article 1738a, Vernon's Ann. Civ. Stat., reads in part as follows:

> "* * * appeals may be taken direct to the Supreme Court of this State from any order of any trial court granting or denying an interlocutory or permanent

> injunction * * * on the ground of the validity or invalidity of any administrative order issued by any State Board of Commission under any statute of this State. * * *."

The article further provides that the Supreme Court shall prescribe the necessary procedural rules to be followed in perfecting such appeal. Pursuant to that directive, Rule 499-a was adopted.

In Atlantic Refining Co. v. Railroad Commission of Texas, ___Tex.___, 346 S.W. 2d 801, our jurisdiction of the direct appeal was attacked and while we did not there discuss the question of jurisdiction that decision by implication holds contrary to appellees' contention.

In so far as appellants complain of the refusal of the Railroad Commission to require compulsory cycling and pressure maintenance in this field is concerned, we do not have jurisdiction of the appeal. The jurisdiction of the Supreme Court on direct appeal is dependent upon and limited to the wording of the Constitutional Amendment, Art. 5 § 3b, and Art. 1738a, Vernon's Ann. Civ. Stat. While in the trial court appellants prayed for an injunction to restrain the Commission "from approving or allowing the withdrawals of gas to market from the Port Acres Field in such quantity and under such conditions as will result in the preventable waste of the hydrocarbon content of such gas until such time as the Commission has duly entered an order or orders requiring the operators in such field to maintain the pressure in the field at a point which will permit the maximum recovery of the hydrocarbons contained in the reservoir to the end that preventable waste of such natural resources shall be prevented," nevertheless the actual relief sought was to require the Commission

to enter a compulsory cycling and pressure maintenance order. It was so considered and treated by the Commission.

These proceedings were instituted before the Commission in the following manner: On November 19th, three months after the adoption of Special Order No. 3-38,395, Peter Henderson Oil Company requested that the Commission hold a hearing to reconsider and amend Rule 3 thereof. Notice was given that the hearing was set for January 27, 1959. On January 22nd Halbouty and Meredith joined in the Henderson Company request and asked that the issues be broadened to include the question of whether recycling or other secondary recovery operations should be instituted and conducted. On January 23rd Pan American joined in the Halbouty-Meredith request. On July 6, 1959, after hearing and consideration, the Commission notified all parties of its action as follows:

> "This is to advise that the Commission, at a formal conference held July 6, 1959, denied your applicaton for a mandatory cycling order for the Port Acres (Lower Backberry) Field, Jefferson County, Texas.
>
> "The Commission further denied your application for an allocation formula based on net acre feet for the subject field and ruled that the allocation fomula based on 2/3 acreage and 1/3 per well shall continue to remain in effect."

In Boston v. Garrison et al., supra, under the direct appeal provision it was pointed out that the Supreme Court does not have jurisdiction where the purpose of the suit is to require or to compel action although the relator prayed "that mandatory injunction shall issue requiring the defendants to issue plaintiff renewal license or provisional license." That in effect was an application for mandamus to compel the department to issue the license.

In Lane v. Ross, 151 Tex. 268, 249 S.W. 2d 591, the relators prayed that the respondent be ordered and commanded not to transmit to the chairman of a state political committee certain minutes and returns of election and that the respondent be ordered to transmit certain other minutes and returns. We held that in this original action this court did have jurisdiction to issue a writ of mandamus but no jurisdiction to grant injunctive relief and since there appeared to be no need for issuance of the mandamus the petition was dismissed.

In Boston v. Garrison we said:

> "* * * In that case [Lane v. Ross] there was jurisdiction to issue the writ of mandamus but no jurisdiction to issue a writ of injunction, and because of the want of jurisdiction the injunctive relief was denied. Here, assuming that constitutionality or validity is properly involved, the court has jurisdiction on direct appeal from an order or judgment granting or denying an injunction, but no jurisdiction on direct appeal from an order or judgment granting or denying mandamus."

So here an application to restrain the Commission from allowing gas to be marketed until the Commission has entered an order requiring recycling of gas is the equivalent of an application to have the court compel the Commission to enter the recycling order. The appeal to the district court lay from two separate and distinct and severable orders of the Commission. A combination of the two complaints in one cause would not serve to give us jurisdiction where otherwise it would not attach.

It appears that the Port Acres Field produces only gas and condensate. It embraces an area of approximately 3,000

acres. The discovery well was completed in 1957. The production is from sands at a depth of something over 10,000 feet. The Commission, in its special order for this field adopted the following spacing rule:

> "Rule 1. No gas well shall hereafter be drilled nearer than thirteen hundred and twenty (1320) feet to any well completed in or drilling to the same reservoir on the same lease, unitized tract or farm, and no well shall be drilled nearer than three hundred and thirty (330) feet to any property line, lease line or subdivision line; provided, however, that the Commission will, in order to prevent waste or to prevent the confiscation of property grant exceptions to permit drilling within shorter distances than herein prescribed whenever the Commission shall have determined that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When exception to this rule is desired, application therefor shall be filed and will be acted upon in accordance with the provisions of Commission State-wide Rules 37 and 38, which applicable provisions of said rules are incorporated herein by reference.
>
> "The aforementioned distances in the above rule are mimmum distances to allow an operator flexibility in locating a well, and the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each one hundred and sixty (160) acre proration unit."

Thus the Commission determined that one well to 160 acres would effectively recover all of the hydrocarbons contained in the field reservoir.

At the time of the trial there were said to be 25 producing wells on large units or tracts and 22 producing wells drilled under permits issued as exceptions to Rule 37.

This suit was brought by Pan American Petroleum Corporation, Michel Halbouty and Meredith and Company. Peter Henderson Oil Company intervened and these four are appellants. A number of the small tract owners intervened and aligned themselves with the Commission. They are H. L. Dillon, Jr., H. C. Barnes, Tyreil-Combest Realty Company and P. G. Lake, Inc. Most of the small tract owners in this field have entered into unitization agreements. For instance, the Peter Henderson Oil Company units, three in number, consist of several hundred small tracts. The 22 Rule 37 wells are situated on tracts ranging from 2/10ths of an acre up to 5 acres; 16 embraced less than one acre and 10 less than one-half acre.

The principal contention urged by the appellants is to the effect that the proration formula in this field allocating production on a basis of one-third per well and two-thirds on the amount of acreage in the tract is not reasonably sustained by substantial evidence, but on the other hand is arbitrary, unreasonable and confiscatory of appellants' property. Under the record before us we are of the opinion that this case is controlled by our recent decision in Atlantic Refining Co. v. Railroad Commission, ____ Tex.____, 346 S.W. 2d 801 (hereinafter referred to as Normanna) and the point is therefore sustained.

The Attorney General in his brief for the Railroad Commission squarely points up the real issue before us that goes to the heart of this case. He says "that townsite operators do have a property right in the reserves underlying the large tract owners, and that that right extends to the right to drain enough oil or gas from other tracts in the field to yield a reasonable opportunity for a profit to the operator." The other appellees also assert that right.

In other words, since the owner of a tract, no matter how small, is entitled to one well to prevent the confiscation of the gas underlying his tract, he, therefore, becomes entitled to confiscate gas from adjacent properties sufficient to pay the cost of his drilling operations and return a reasonable profit. In support of that proposition he cites only Railroad Commission v. Humble Oil & Refining Co., Tex. Civ. App., 193 S.W. 2d 824, wr. ref. n.r.e., [the Hawkins case] where the following statement is to be found:

> "As a corollary to these rules, it is held that the owner of an 'involuntary' segregated tract cannot be denied the right to drill at least one well on his tract however small it may be. From which it would seem that his allowable can not be cut down to the point where his well would no longer produce, (See Railroad Commission v. Mackhank, Tex. Sup., 190 S.W. 2d 802) nor below the point where it could not be drilled and operated at a reasonable profit." (No authority is cited in support of the latter conclusion).

In the Mackhank case the only proposition decided by this court was that there was substantial evidence reasonably supporting the conclusion that in order to prevent waste it was necessary to keep the two wells on production and the order was therefore not invalid. The Mackhank decision can in no way be construed as authority for a rule that would require allowable production sufficient to return the cost of the well and its operation plus a reasonable profit. The conservation statutes nowhere suggest such a factor. We find nothing in the law to justify that proposition.

In the Hawkins case the testimony was that Humble's properties contained 76.5 per cent of the recoverable

reserves of the entire field and under the effective proration order it was allowed to produce only 71.4 per cent and this, if continued for the estimated life of the field, some 27 years, would result in drainage from the Humble's properties to the Townsite section of some thirty million barrels of Humble's oil. Some witnesses, on the other hand, testified that the productive life of the Townsite 73.74 acres would be shortened below that of the remainder of the field by some ten years on account of its position on the structure and the heavy withdrawals. Another witness testified that in his opinion if production were unrestricted the town lot wells would produce more oil than under the proration order then in effect. The court pointed out other considerations and factors which served to support the reasonableness of the Commission's order.

The Hawkins case goes further to state the accepted rule which is contradictory of any theory that the allowable must be fixed on a cost plus profit basis, namely, "In the exercise of this rule of curtailment it is generally recognized that the rules and regulations adopted must, as far as practical, and within reasonable limitations afford the several property owners a fair opportunity to produce the recoverable oil underlying their lands or its equivalent. This rule had theretofore been firmly established in our jurisdiction.

In Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73 (1939), we held:

> "* * * It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th. Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S.W. 2d 1240, writ refused. * * *."

Again in Trapp v. Atlantic Refining Co., Tex. Civ. App., 169 S.W. 2d 797, wr. ref., it is said:

> "* * * The uniform holding has been that the criterion implicit in this exception is whether the well is necessary to protect the owner in his right to obtain his fair share (or the equivalent thereof) of the recoverable oil underlying his land. Both of these exceptions were discussed and upheld in Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73. Since the issue raised in this contention has been so conclusively adjudicated, its discussion as an original proposition is both unnecessary and undesirable."

The Legislature announced a declaration of policy in the production and use of natural gas in § 1, Art. 6008 as follows:

> "In recognition of past, present, and imminent evils occurring in the production and use of natural gas as a result of waste in the production and use thereof, in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production."

In Corzelius v. Harrell, 143 Tex. 508, 186 S.W. 2d 961, we quoted with approval the language used by the United States Supreme Court in Thompson v. Consolidated Gas Corporation, 300 U.S. 55, 57 S. Ct. 364, 81 L. Ed. 510:

> "* * * It may be assumed that House Bill 266 [Art. 6008] should be construed as authorizing regulations to prevent waste, and to create and protect correlative rights of owners in a common reservoir of gas

to their justly proportionate shares thereof, free of drainage to neighboring lands. * * *."

In Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W. 2d 941, we held that "Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner of such land or his assigns; and such owner has the right to mine such minerals subject to the conservation laws of this State. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation."

As pointed out in Normanna we also held in the Marrs case that the allowables fixed for the two separate areas were entirely out of proportion to the potentials and would result in the taking of one man's property and giving it to another. Although the Marrs case rejected the substantial evidence rule; nevertheless that is not to say that the rules of law otherwise announced by that decision are wrong or have been overruled by later decisions of this court.

In the case presently before us the basic facts are not substantially in dispute. The contentions arise over conclusions to be drawn from those facts. From the testimony of Dillon's witness, the only witness offered by any of the appellees, it appears that a 1-acre tract under the 1/3 - 2/3 formula would have a total gross income from April 1, 1960, to the end of its productive period of $407,501.00. The total cost of such a well, including drilling, operating, and royalty expenses, would be $361,674.00, leaving a net profit of $45,827.00. The same testimony shows that under a formula based on acre feet of producing sand, each 1-acre tract even without prior production would have only

a total gross income of $50,867.00. This witness further testified that the total hydrocarbon recovery from each 1-acre tract under the 1/3-2/3 formula would be 1,542,987 MCF of gas and 69,358 barrels of condensate. That of this total recovery, 1,432,987 MCF of gas and 62,858 barrels of condensate would be contributed by drainage. In other words, each 1-acre lot depends upon drainage for 92.87% of its gas discovery and 90.63% of its condensate recovery.

The witness further testified that the estimated field capability is 165,932,900 MCF of gas and 7,458,732 barrels of condensate; that the 22 small tract wells combined would recover 33,945,714 MCF of gas and 1,525,876 barrels of condensate. This witness estimates a total of 116,063 acre feet of producing sand in the Port Acres Field and he assigns 2,050 acre feet of this total or 1.77% to the 22 Rule 37 tracts. According to his figures, these small tracts with 1.77% of the producing sand would under the 1/3-2/3 formula recover 20.46% of the field's total gas and condensate potential.

Petitioner's exhibit from the Railroad Commission allowable schedule for September, 1960, shows 20 Rule 37 wells with a total allowable of 193,599 MCF of gas. Twenty-five wells on normal 160-acre proration units (some being less than 160 acres) are allowed to produce 1,116,416 MCF of gas. The tracts on which the 20 Rule 37 wells are situated comprise only 19.89 acres, while the 25 regular wells are located on 3,036 acres. Thus, on a productive acre basis, the 20 wells having .65% of the total acreage receive 14.6% of the allowable.

By way of comparison between the well on one of the largest producing units and the well on one of the smallest units, the following table is constructed from the testimony of the appellees' witness:

Surface Acreage		Monthly Allowable (MCF)	Average
Pan American Ward	176.00	48,587	276.06 MCF per acre
Thompson-Sassine	25	9,515	38,060.00 MCF per acre
Acre-Feet of Sand			
Pan American Ward	19,851.0	48,587	4,932 MCF per acre foot
Thompson-Sassine	17.8	9,515	534,551 MCF per acre foot

Thus, on the basis of the present proration order the well on the one-fourth acre tract is allowed to produce 137 times as much gas pet acre as the well on 176 acres and 107 times more per acre foot of producing sand.

Article 6008, § 12, Vernon's Ann. Civ. Stat., provides that the Commission shall proceed to regulate and prorate gas production in the reservoir "on a reasonable basis". The Article further provides that "the monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste." Section 12 of that statute provides that the Commission shall take into account in fixing the daily allowable production for each gas well the size of the tract, the relation between the daily producing capacity and the aggregate daily capacity of all gas wells and all other factors which are pertinent.

The appellees offered some testimony that there is potentially a water drive from the east to the west that would result in longer and greater production in the western portion of the field where the Rule 37 wells are located, the theory being that this water drive would limit and flood out the eastern wells forcing the gas westward into the higher structure where the Henderson Rule 37 wells are located, thus compensating Henderson at least in part for the drainage loss. On the other hand the appellants' wit-

nesses emphatically assert that there is presently no water drive and deny that there is any indication of such occurrence in the future. We understand from the testimony that no water drive has yet occurred that has resulted in any loss to or flooding of the wells to the east where the drive would first be felt. Admittedly these Rule 37 wells are located in the area where the producing sand stratum is thicker and the structure is higher. In our opinion neither of these factors offer any comfort to the Rule 37 appellees because their tracts are almost completely surrounded by and lie within the confines of the Peter Henderson oil units and will necessarily drain from those units. There is testimony in the record that Halbouty and Meredith under the 1/3-2/3 formula will eventually produce substantially all of the gas estimated to underlie their land, but this fact does not tend to make the formula a reasonable one as between the Rule 37 wells and Henderson.

In making a comparison between the Peter Henderson units and the 20 Rule 37 wells[4] we use the testimony of appellees' witness. The Henderson units comprise 520.3 acres or 19.84% of the total field acreage and have 16.13% of the total field allowable while the 20 Rule 37 wells have a total of 19.88 acres or .76% of the total acreage and receive 14.78% of the total allowable.

From the testimony of the same witness it appears that Peter Henderson has 33,807 acre feet or 29.37% of the total acre feet in the field, while the 20 Rule 37 wells have only 1,957 or 1.70% of the total.

The appellees urge that this case is distinguishable from Normanna on the facts and therefore the latter should not control. (1) They say the Normanna Field had not been

[4] Only wells on October, 1960, Proration Schedule are used.

substantially developed, whereas the Port Acres Field is well developed. While this is true, that fact would appear to militate in favor of the appellants rather than of the appellees because the greater the development and the more accurate the obtainable geological information, the less justification can be found for applying the standard 1/3-2/3 proration formula. (2) They maintain that the allocation formula here is beneficial to some of the large tract producers and does not deprive them of any property rights. Although there is evidence that some of these producers, due to early production, or for other reasons, may recover 100% or more of their reserves in place, it is clear, however, that at least one of them, Henderson Oil Company, whose large units are composed of unitized small tracts, will suffer loss from drainage to the Rule 37 wells. (3) They say as contrasted with Normanna this is not solely a case of large tracts against small ones because Henderson makes the contention that the formula is inequitable as among the large tracts. We fail to see how this would make a material distinction, although the case here is principally one of small tracts that have been unitized against small tracts whose owners have preferred not to unitize. In Normanna we were concerned with only one small tract. Here 40 permits have been granted to drill small tracts of which there are 500 in the field, presenting a much more serious problem so far as orderly economical development is concerned.

Another point of distinction urged is that in Normanna the attack was made against the 1/3-2/3 formula while in this case the appellants asked the Commission to enter their "recommended order" in lieu of the 1/3-2/3 proration order. In other words they say that by the terms of appellants' application the Commission was limited to an ac-

ceptance or rejection of the recommended order in that the appellants asked for no other relief than on a "take it or leave it" basis. They argue that there is a great difference procedurally between an application to enter a specific order and one claiming that the rule in effect is unduly harmful and requesting the Commission to rescind that rule and enter one that is fair and in its stead.

We do not so construe the proceedings in this case nor evidently did the Commission. Henderson's application reads "On behalf of Peter Henderson Oil Company we wish to request a hearing to reconsider and amend Rule 3 of the special order adopting rules and regulations for the Port Acres [Lower Hackberry] Field of Jefferson County, Texas." At the time of filing of Henderson's application, November 19, 1958, only one permit to drill in this field as an exception to Rule 37 had been requested and it was not granted until December 22, 1958. The notice of the hearing issued by the Commission recited that the hearing would be held for the purpose of considering the application of Peter Henderson Oil Company and concluded as follows: "Pursuant to said Hearing the Commission will enter such rules, regulations, and orders as in its judgment the evidence presented may justify."

In Henderson's motion to the Commission for rehearing it is argued that the present formula is unjust and unfair and does not allow to all parties a fair opportunity to have and produce their fair share of the gas and condensate from the reservoir. In that connection the motion urges the Commission to take into consideration the variation of the sand thickness, the size of the tracts, the drainage from the thick sand portion of the field into the thin sand and all other pertinent factors shown by the evidence to exist.

It is also argued that if the per well factor is retained it should be substantially less than one-third.

The proceedings before the Railroad Commission are informal and their validity will not be tested by the technical rules of pleadings and practice that obtain in court trials. Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W. 2d 967; Cook Drilling Co. v. Gulf Oil Corporation, 139 Tex. 80, 161 S.W. 2d 1035.

The fact that appellants suggested and urged upon the Commission that the proration formula should limit recovery substantially to the reserves in place beneath each tract does not foreclose their right to complain of the formula which they considered inequitable and confiscatory of their property nor does it limit the Commission solely to the option of either accepting or rejecting the proposed formula in toto. All parties, of course, concede that the court is not empowered to direct the Commission as to the nature or terms of its order or what weight should be given to the several allowed factors. We are limited to passing upon the validity of the order as promulgated.

The appellees, in seeking to uphold the proration formula adopted by the Commission, discuss at considerable length the so-called "rule of capture" and claim some benefit or protection under that rule. They cite among other cases Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W. 2d 935, 87 S.W. 2d 1069; Corzelius v. Harrell, 143 Tex. 509, 186 S.W. 2d 961; Ryan Consolidated Petroleum Corporation v. Pickens, 155 Tex. 221, 285 S.W. 2d 201. The doctrine of these cases is stated in Corzelius as follows:

> "The rule in this State recognizes the ownership of oil and gas in place, and gives to the lessee a determinable fee therein. It is also held that such rule should

> be considered in connection with the law of capture, which is recognized as a property right and both rules are subject to regulation under the police power of this State."

Somewhat more positively we said in Elliff v. Texon Drilling Company (1948), 146 Tex. 575, 210 S.W. 2d 558, 44 A.L.R. 2d 191,[2] that:

> "In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations."

In Ryan v. Pickens it is stated that "The courts of Texas have consistently held that the rule of capture is still in force in this State. It has become a vested property right." That is not to say, however, that the rule of capture is unlimited or not modified by the accompanying rule recognized by all the cases and stated in the *Ryan* case as follows:

> "* * * Here [in Texas] oil and gas in place are by the established rules of property a part of the realty or corpus of the land, and subject to ownership, severance, conveyance, lease and taxation as such. * * * *."

The very fact that the Commission has the right to limit production on the basis of acreage is a recognition of that

---

[2] See also cases cited:
Lemar v. Garner, 121 Tex. 502, 50 S.W.2d 769; **Humphreys-Mexia Co. v. Cannon**, 113 Tex. 247, 254 S.W. 296, 29 A.L.R. 607; **Waggoner Estate v. Sigler Oil Co.**, 118 Tex. 509, 19 S.W.2d 27; **Texas Co. v. Daugherty**, 107 Tex. 226, 176 S.W. 717, L.R.A. 1917F, 980.

principle. If the Commission has the legal right, which they formerly exercised, to fix a proration formula based one-half per well and one-half on the amount of acreage, and as now generally practiced of basing the allowable 1/3 on the well and 2/3 on the acreage, then there is nothing in the rule of capture that would make it illegal for the Commission in the exercise of its sound judgment and discretion now to give greater or less weight to the well or acreage factors or for that matter to the amount of reserves in place or any other field factors as provided by the statute.

It is an obvious result that if in a common reservoir one tract owner is allowed to produce many times more gas than underlies his tract he is denying to some other landowner in the reservoir a fair chance to produce the gas underlying his land.

As to the right of capture, appellees refer to the following statement in Brown v. Humble Oil & Refining Co., 126 Tex. 297, 83 S.W. 2d 935, 87 S.W. 2d 1096:

> "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that was flowing out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner diminishing the oil and gas under one's land by the exercise of the same right of capture. The following decisions discuss the law of capture as applied in this State: Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566; H. & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 66 L.R.A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827; Prairie Oil & Gas Co. v. State (Tex.

Com. App.) 231 S.W. 1088, 1089. Both rules are subject to regulation under the police power of a state."

The court seems here to be merely stating what the rule of capture is if unlimited by correlative rights, for in the preceding paragraph the court expressly reaffirms that in Texas the law recognizes the ownership of oil and gas in place and gives to the lessee a determinable fee therein.

To infer that the rule of capture gives to the landowner the legally protected right to capture the oil and gas underlying his neighbor's tract is entirely inconsistent with the ownership theory. To harmonize both rules, the rule of capture can mean little more than that due to their fugitive nature, the hydrocarbons when captured belong to the owner of the well to which they flowed, irrespective of where they may have been in place originally, without liability to his neighbor for drainage. That is to say that since the gas in a continuous reservoir will flow to a point of low pressure the landowner is not restricted to the particular gas that may underlie his property originally but is the owner of all that which he may legally recover. This seems to be substantially the view expresed in Brown v. Humble, supra.

In Stephens v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566, it was determined that the rule of capture does not conflict with the view of absolute ownership of the minerals in place and we quote: "If the owners of adjacant lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative rights to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own." In the Port

Acres Field under the application of the existing proration formula Henderson does not enjoy any correlative rights so far as the small tract wells are concerned since there can be no compensatory drainage to Henderson from the small tracts.

In Normanna the evidence shows that the 1/3-2/3 formula would result in the drainage of a tremendous quantity of gas and condensate from other leases in the field to the .3-acre lease in question, though the precise amount of drainage was incapable of ascertainment, and of course such drainage could not be compensated by drainage from the .3-acre tract to other leases in the field. The evidence further showed that the order would allow the well on the .3-acre tract to produce at a rate of over 200 times as much gas per acre as a well on the 320-acre unit established by the spacing pattern. We think the evidence here is comparable to that in Normanna. Under the order adopted in the Port Acres Field more than 90% of the hydrocarbons recovered by the Rule 37 wells would be drained from other leases in the field. As said in Normanna the proration formula adopted here of 1/3-2/3 does not come close to compelling ratable production nor afford to each producer in the field an opportunity to produce his fair share of gas from the reservoir.

We fully appreciate the thorny problem that the Commission has in this matter of proration among the hundreds of fields under their supervision with different characteristics and the diverse conflicting interests, views and opinions but we are confident that with the trained personnel at their disposal a much nearer approximation can be made, giving to all parties an opportunity to produce a fair share of the minerals underlying the field with ratable allowables that will be more nearly equitable than appears in the

case before us. As long ago as 1935 we said in the Brown v. Humble Oil & Refining Company case:

> "* * * It is now, however, recognized that when an oil field has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions."

So far as the appellees' complaint that a striking down of the 1/3-2/3 formula would probably entail heavy financial loss to them, it may be said that they drilled their wells at their own risk. There is some indication in the record by bill of exception that they were offered unitization that would prevent confiscation and afford to them a fair share of the mineral proceeds from the common source. While the statute does not compel unitization, nevertheless it does expressly authorize that procedure subject to the approval of the Railroad Commission, Art. 6008b, V.A.C.S. It is to be reemphasized that their permits were granted for the purpose of avoiding confiscation of the minerals underlying their properties and not for the purpose of enabling them to drain the minerals underlying adjoining lands to pay the cost of their operations plus profits. This does not mean and we are not to be understood as foreclosing the power of the Commission, by proper order or exception, to allow the holder of a Rule 37 permit to recover a sufficient amount of oil or gas to repay drilling and production costs and provide a reasonable profit when no other means of recovering the minerals which underlie his land are available. No such problem is before us.

From the foregoing it follows that the 1/3-2/3 proration formula as applied by the Commission in the Port Acres Field is invalid in that it does not afford an opportunity to all of the parties to produce and save their fair share of the minerals or their equivalent. We hold that it is not reasonably supported by substantial evidence.

The judgmen of the trial court is reversed and judgment rendered for appellants.

Frank P. Culver, Jr.
Associate Justice

Associate Justice Griffin dissents.

FPC:A
Opinion delivered:
February 14, 1962

APPENDIX "B"

Dissenting Opinion of Associate Justice Smith

IN THE SUPREME COURT OF TEXAS

NO. A-8200

MICHEL T. HALBOUTY, et al., Appellants,	§	On Direct Appeal
v.	§	
RAILROAD COMMISSION OF TEXAS, et al., Appellees.	§	from Travis County.

DISSENTING OPINION ON MOTION FOR REHEARING

I respectfully dissent. Upon further consideration, I find that to agree with the majority would place me in a completely inconsistent position with that of former decisions of this Court, especially those wherein I was the author of the majority opinion. This is especially true when considered in the light of the decisions in Ryan Consolidated Petroleum Corporation v. Pickens, 155 Tex. 224, 285 S.W. 2d 201, and other cases discussed herein. Not only that, the majority opinion bears out my fear that the Normanna decision was the opening wedge to compulsory pooling by judicial decree. See my dissent in Atlantic Refining Company v. Railroad Commission, Tex. , 346 S.W. 2d 801. However, expressions in the majority opinion in that case lead me to think that possibly the holding announced by the majority only applied to that particular case. I am inclined to believe that many of the oil and gas attorneys were of a similar view. When I wrote the dissent in Normanna, it was my deliberate purpose to guard against compulsory pooling by judicial decree. I find the Court now following the advocates of compulsory pooling in the pres-

ent case, although the Normanna case did not actually deny the right of separate development to owners of small tracts. I am now convinced that the Halbouty decision effectually denies such right and apparently authorizes compulsory pooling without any legislative authorization.

The right of separate development of small tracts has long been recognized by the Texas courts. In fact, it has become a settled rule of property. The fact that the rule was announced in so-called Rule 37 cases does not mean that such rule is confined in application to such cases.

The Railroad Commission of Texas has in the past rigidly followed the law as announced by this Court in Ryan and other cases and has adopted rules consistent with the principles of law announced in cases prior to Normanna. The Railroad Commission steadfastly adhered to the law and has awaited action of the Legislature, the only department of government that has the legal power to compel compulsory pooling.

After the Normanna decision, the Railroad Commission was confronted with the difficult task of adopting rules and regulations for the Normanna Fields. The Railroad Commission obviously reached the conclusion that the Normanna decision could mean nothing other than compulsory pooling. On September 27, 1961, the Railroad Commission adopted new rules for the Normanna Fields. The Commission in its order took cognizance of two short paragraphs in the Normanna opinion wherein the Court said that the 2/3-1/3 rule did not come close[1] to compelling ratable

---

1 "It does not come close to compelling ratable production; neither does it offer each producer in the field an opportunity to produce his fair share of the gas from the reservoir."

production and that the responsibility was upon the Commission to devise some rule of proration which would conserve the gas in the field in question and at the same time be fair and just to all parties.

It should be noted that the Normanna opinion carefully avoided specifically directing the Railroad Commission to adopt a rule encompassing compulsory pooling. In fact, it gave no specific direction in this respect. However, the Commission was of the opinion[2] that compulsory pooling was demanded by the Normanna decision. Rule 3b[3] and

---

[2] "The responsibility rests with the Commission to devise some rule of proration which will conserve the gas in the field in question and at the same time be fair and just to all parties without depriving any of them of his property."

[3] "WHEREAS, From a study of the full record adduced at said hearing, which included technical, reservoir data and legal briefs submitted by the several interested parties, the Commission is of the opinion and finds that an acreage allocation formula would reasonably provide each party an opportunity to produce its fair share of the gas in a reservoir, but because of the additional responsibility placed upon the Commission, that is, to arrive at a means of preventing confiscation of a small tract's reserves while allowing each operator to produce its fair share of the gas in a reservoir, as knotty a problem as has ever been placed before the Commission, must be solved, that such solution in all probability is best resolved through the use of a special allowable that would encourage a small tract owner to negotiate with his neighbors for fair and just treatment, but would also provide a sufficient allowable to such small tract to encourage a reasonable attitude in such neighbors so that they would endeavor to work out this common problem. . . ."

[4] "Rule 3b. Any operator having the right to drill a gas well upon a tract containing less than 100 acres, after application, notice and hearing prior to the drilling of the well, may, if in the judgment of the Commission the facts so justify, be given a definite and fixed special allowable, provided the well is completed as a producing well, higher than the allowable that would be fixed for any well completed upon such tract by reference to said allocation formula upon proof to the Com-

other provisions in the special order issued on September 27, 1961, strongly indicate that the Commission felt that this Court had by the Normanna decision released the Commission from the duty of following the well-settled rules of property which had been firmly announced by this Court in the decisions hereinafter cited.

The Halbouty decision confirms the action of the Commission of September, 1961. In other words, Halbouty said, in effect, to the Commission that it correctly concluded, in adopting the September, 1961 rules, that it had the authority under the Normanna decision to fix an allowable for wells on small tracts in the absence of statutes providing for compulsory pooling.

The Halbouty decision falls in line with the advocates of compulsory pooling and for the first time informs the litigants as to what the majority really had in mind when

---

mission (1) that the drilling and completion of a well upon said tract is not economically feasible; and (2) that each and every owner of the right to drill upon acreage immediately adjacent to said tract of less than 100 acres has refused to allow the pooling of said tract with enough of said immediately adjacent acreage to create a drilling unit of at least 100 acres upon fair and reasonable terms; that is, upon such terms as would allow the owners to drill, complete and operate the well to be drilled thereon and as would provide that all income received from 7/8ths of the production from said well and all expense of drilling, completing and operating said well should be shared among the owners of the working interest in said drill-site unit upon an acreage basis. Such special allowable shall control the production of gas from said well during its producing life, except that said allowable shall be related properly to total field production as the same may fluctuate and said special allowable, if granted, shall in no event exceed the allowable of a gas well completed on a tract containing 100 productive acres; provided further, however, that any well drilled before the adoption of this rule will be treated, for purposes of this rule, as though it had not yet been drilled."

it wrote the Normanna decision. However, I wish to point out that even after Normanna, the advocates of compulsory pooling recognized that the Texas courts had definitely established the right of separate development. May I digress to say that we do not have before us here the question of whether or not the property rule prevailing in Texas has caused gross inequities. The question is: Are we going to depart from the Court's consistent adherence to the rule that a tract, no matter how small, is entitled to one well as a mater of right unless the tract is a part of a voluntary subdivision, and that the Legislature is the only body that can bring about compulsory pooling? It is well recognized that the Texas rule of property stands for the proposition that in Texas, the owner of a small tract is entitled to one well as a matter of right and that to limit the allowable for that well to a figure commensurate with the recoverable *oil and gas in place beneath the tract* would make the well an unprofitable one and his right to drill a well on his tract would be a futile thing. This rule of property has been completely destroyed by the Halbouty decision, particularly when this Court said:

> "So far as the appellees' complaint that a striking down of the 1/3-2/3 formula would probably entail heavy financial loss to them, it may be said that they drilled their wells at their own risk. There is some indication in the record by bill of exception that they were offered unitization that would prevent confiscation and afford to them a fair share of the mineral proceeds from the common source. * * *"

Clearly, without statutory standards, the Railroad Commission cannot adequately exercise the power of compulsory pooling now given to it by Halbouty. On the other hand,

the owner of small tracts are left at the mercy of the standards fixed by the owners occupying the position of Halbouty and Henderson - this, without regard to whether the small tract owners are wealthy, middle class, or poor.

In this case, the offers to pool made by Halbouty and Henderson are most indefinite, this because there exists no legislative guide fixing the standards for determining how expenses and revenue is to be shared. Each operator who is fortunate enough to have gotten together several small tracts is left to make his own ground rules. This cannot be sound. For example, in this case, Halbouty offered to pool and unitize his leases with others, but all that his offer said on the subject of expenses was that Halbouty will "pay and bear his ratable share of the cost of drilling and operating costs." I think Dillon's argument on this particular phase of the case is sound and I quote:

> "Does 'ratable' mean on the basis of surface acreage? If so, it would obviously be an unfair basis of pooling or unitization, if the thin leases of Halbouty on the east were unitized with tracts in the center of the field having very thick and productive sands. Or, on the other hand, does 'ratable' mean that the costs and revenue would be divided on the basis of estimated acre feet of net productive sand? If so, whose estimate is to be taken as the criterion? Must the Railroad Commission set up a schedule of acre feet, resolving the tremendous conflicts between experts as to how many acre feet are beneath the various tracts?
>
> "To illustrate the difficulties, it may be pointed out that with reference to the Henderson-Doornbos No. 2 Unit, Halbouty's expert estimated that it had 420 acre feet, whereas Henderson's expert estimated that it had 1,760 acre feet, or an increase of 319% over the estimate of Halbouty's witness. Similarly, as to the

Henderson-Doornbos No. 1 Unit, Henderson's expert gave his client's lease an estimated 2,165 acre feet as compared to Halbouty's witness's estimate of 765 acre feet, or an increase of about 180%. Similarly, as to the Henderson-Montrose Unit, Halbouty's expert estimated that it had only 7,764 acre feet, whereas Henderson's expert estimated that it had 14,300 acre feet. In other words, Mr. Henderson's expert increased the estimate of Halbouty's expert by 84%.

"We assume, from what the Court has said, that the Railroad Commission must decide whether acreage, or acre feet, or estimates of reserves in place, or some other standard will be the basis for allocating expenses and revenues among the owners of tracts which are forced to unitize and the Commission must resolve any conflicts between experts in estimating productive acreage or acre feet or reserves in place. Even though the owners of small tracts feel that their acre feet or reserves are being grossly underestimated, in relation to similar estimates for adjoining tracts, still they would have to accept whatever the Railroad Commission decides if they are to share in the pool or unit. Presumably, also, the large unit operators must accept the Commission's decision under the threat that, if they do not, the small tract owners will be allowed to produce enough gas to pay back costs plus some profit. In that event, we respectfully ask, if the large unit operators either refuse to pool or unitize or will not accept the decision of the Railroad Commission regarding their share of any proposed unit, by what legal authority is the Railroad Commission then empowered to authorize the owners of small tracts to go ahead and separately develop their tracts and receive an allowable which will permit them to drain more gas than they originally had in place? Is the legal test of 'confiscation' in such cases to be something other than the denial to the owners of large tracts of

the right to recover the gas in place beneath their tracts?"

The right of separate development of small tracts, where the owners did not voluntarily pool with other tracts, has never been questioned in former decisions. Even though the Legislature in Article 6014, Vernon's Annotated Civil Statutes, gave the Railroad Commission broad authority to enact orders to prevent waste, the Legislature was very careful in paragraph (g) of this statute to expressly declare that it was not the intention of the Legislature to require repressuring of an oil pool or that the separately owned properties in any pool be unitize ' under one management, control or ownership. The Normanna decision is now being used as express authority from the Supreme Court of Texas to the Railroad Commission to ignore such cases as Ryan Consolidated Petroleum Corporation v. Pickens, supra; Pickens v. Ryan Consolidated Petroleum Corporation, Tex. Civ. App., 219 S.W. 2d 150, wr. ref. n.r.e.; Halbouty v. Darsey, Tex. Civ. App., 326 S.W. 2d 528, 532, wr. ref. n.r.e.; Nale v. Carroll, Tex. Civ. App., 266 S.W. 2d 519, 526, affirmed 155 Tex. 555, 289 S.W. 2d 743; Coates v. De Gracia, Tex. Civ. App., 286 S.W. 2d 691, 694; Section 1 of Article 6008b, Vernon's Annotated Civil Statutes; Dailey v. Railroad Commission, Tex. Civ. App., 133 S.W. 2d 219, wr. ref.; Stanolind Oil & Gas Company v. Railroad Commission Tex. Civ. App., 96 S.W. 2d 664, no wr. hist.; Nash v. Shell Petroleum Corporation, Tex. Civ. App., 120 S.W. 2d 522, wr. dism.; Railroad Commission v. Delhi-Taylor Oil Corporation, Tex. Civ. App., 302 S.W. 2d 273 wr. ref. n.r.e.; Halbouty v. Darsey, Tex. Civ. App., 331 S.W. 2d 835, no wr. hist.; Atlantic Refining Company v. Railroad Commission, Tex. Civ. App., 330 S.W. 2d 494, wr. ref.

n.r.e.; Railroad Commission v. Humble Oil & Refining Company, 151 Tex. 51, 245 S.W. 2d 488.

My contention is simply this: The statutes now in effect do not compel unitization. Therefore, the Railroad Commission has no legal authority to enter orders which would have the effect of requiring or compelling unitization. This very argument was persuasive and no doubt caused this Court in the Ryan case to adopt the view as expressed in the final majority opinion that without legislation requiring compulsory pooling, the Court had no power to enact such legislation. Thus, the Court adhered to the separate tract development theory under the well-settled rule of property. In the Ryan case, we discussed the fact that the State of Mississippi and other states had adopted unitization and pooling statutes, but expressly held that the rule of capture "has become a vested property right" and the "Legislature of Texas has not seen fit to enact legislation which would authorize the Railroad Commission to adopt and promulgate rules which would have the effect of rendering ineffective the rule of capture recognized in all the decisions in this State." The opinion of the majority in the present case, nullifying the proration order in the Port Acres Field, does exactly what the Ryan case said the Legislature of Texas has not seen fit to do. It not only authorizes, but it even requires the Railroad Commission to adopt and promulgate rules which would have the effect of rendering ineffective the rule of capture as recognized in all previous decisions in Texas. It cannot be said that the Ryan case was decided without due regard to all the problems we have presented in the present case. It was argued in the Ryan case that the majority opinion in that case permitted the confiscation by Pickens & Coffield of minerals belonging to Ryan. The dissenting opinion stressed the contention

that the majority opinion was based primarily on the rule of capture and strongly urged that Ryan was entitled to equitable relief to the extent that it should share in the ownership of all oil produced from Pickens and Coffield's land and that to allow the rule of capture to prevail would amount to an unconstitutional confiscation of Ryan's property, the theory being that "under our law no one has a right simply to capture the property of someone else." This Court rejected that theory. We said:

> "Petitioner's [Ryan] contention that this case is one for equitable relief should not be sustained for the further reason that its position is inconsistent with the law of capture, which is a well-settled rule of property in this jurisdiction. The rule of capture is simply this —that the owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though part of such oil or gas may have migrated from adjoining land. The Railroad Commission is without power from the Legislature * * * to do anything * * *."

We rejected the State of Mississippi authorities primarily on the ground that our Legislature had not adopted statutes to "safe-guard, protect and enforce the co-equal and correlative rights of owners in a common source or pool of oil and gas to the end that each such owner in a common pool or source of supply of oil and gas may obtain his just and equitable share of production therefrom * * *."

I still say, as we said in Ryan, that the Legislature of Texas has not seen fit to enact legislation which would authorize the Railroad Commission to adopt and promulgate rules which would have the effect of rendering ineffective the rule of capture recognized in all the decisions

in this State. The majority, on the other hand, now refuses to consider the physical facts with regard to "the peculiar characteristics of oil and gas", which has been established. See Brown v. Humble Oil & Refining Company, 126 Tex. 296, 83 S.W. 2d 935, 87 S.W. 2d 1096. Justice Wilson, the writer of the dissent in Ryan, said that the principles of geology and reservoir dynamics then known upheld his view and would eventually meet "with the same acceptance in judicial thought that they are accorded in business and financial thinking." We rejected such thinking then and should do so now. I agree with Dillon et al when they say, in their motion for rehearing, that the present decision in this case creates immediately many complex problems and, in the absence of legislation on the subject, leaves the Railroad Commission without a proper standard to be used in discharging its duties so far as oil and gas is concerned. The motion points out some of these problems, such as:

> "For example, exactly what does the Court mean when it says in its opinion (page 16) that 'the landowner is not restricted to the particular gas that may underlie his property *originally* but is the owner of all which he may legally recover? What is the test of what an owner can 'legally recover'? Is it the *equivalent* of the gas which was, *originally in place* beneath his tract? If so, must he stop producing his well when he has recovered such amount of gas, even though the reservoir beneath his tract has by that time been again refilled by gas which has been drained from other properties?
>
> "For example, every witness who testified in this case said that the appellant, Halbouty, would recover under the present proration formula *substantially more than 100%* of the recoverable gas originally in place beneath his leases, and it was admitted in Halbouty's

> main brief in this Court that he will recover over 26% of the field reserves, whereas it is estimated that his leases have only 22% of the field reserves under them. Must Halbouty stop producing when he has recovered 100% of the original reserves in place beneath his units? If he produces more than this, is he liable to Henderson for excessive drainage, since Henderson will suffer by excessive drainage to Halbouty's tracts (meaning by 'excessive' an amount exceeding the gas originally beneath the Halbouty leases)?" [Emphasis added.]

I agree with Dillon et al when they say:

> "Increased knowledge of engineering and geological facts about oil and gas reservoirs has not changed the fundamental nature of oil and gas as fluid substances which move in the reservoir, without regard to property lines, in response to pressure differentials, which are established by either natural or artificial forces. Where and how and to what extent such movements will take place cannot be predicted with certainty even now, particularly where wells are spaced widely apart and only estimates or intelligent guesses can be made as to the condition of the reservoir in the large undrilled areas between the wells. To apply, as the Court apparently has done in the opinion in this case, the same rules of property to oil and gas which are applied to solid minerals, is not only an abandonment of established rules of property but also an attempt to ignore fundamental physical facts."

There is no sound reason for the abandonment of the rules of property which have been long established in Texas. No previous decision has held that the Railroad Commission must deny a living allowable to a first well on a separate

tract. The Dillons et al., and other small tract producers in the Port Acres Field, have spent millions of dollars in drilling costs alone. If this decision is permitted to stand these people cannot possibly recover their costs, because the allowables for such well will be limited so far below their producing capacity that they can recover only the equivalent of the gas in place beneath each tract. No previous decision, including the Normanna decision, has intimated, much less held, that the Railroad Commission would be required to cut the allowables of the many Port Acres wells to the point where they could recover only a very small fraction of their cash investment. In the Normanna case, the Court indicated only that the predicted net profit to the Bright & Schiff well was unreasonably high. I think everyone will agree that the Normanna case was revolutionary, but, at the same time, there was nothing even in that case indicating that the Railroad Commission would be required to destroy the investments of the owners of wells lawfully drilled upon separate tracts. In this connection, I concurred in the result reached in the case of Railroad Commission of Texas et al. v. Murel Williams, Tex. , for the reasons stated in a concurring opinion delivered on April 11, 1962. I concurred in the result only for the reason that, in my opinion, the Court in the Williams case was lending encouragement to the advocates of compulsory pooling in their effort to effectively destroy the rules of property heretofore announced and followed by The Supreme Court of Texas.

In my opinion the allocation formula attacked in this case is reasonably supported by substantial evidence. The District Court correctly excluded the testimony of Commissioner Murray.

I agree with Dillon et al. when they say:

> "The proration orders attacked in this case are legislative orders, in that they apply generally to all producers in the Port Acres Field and are prospective in operation. Therefore tests which would apply to judicial or quasi-judicial decisions cannot properly be applied to the proration orders involved in this case. Certainly no one would contend that a statute could be attacked on the ground that the legislators voting for the statute had previously committed themselves, by agreements among themselves or otherwise, to a policy embodied in the statute, before it was passed. The only question would be whether the statute, based on evidence heard by the Court, is or is not in conformity with constitutional requirements. So, it is submitted, in this case, where a legislative order of the Railroad Commission is concerned, the Court should not inquire into the policies, motives, or methods of the Commission which caused it to adopt this formula rather than some other."

A helpful discussion of the scope of judicial review of oil and gas orders of the Railroad Commission is contained in the opinion in Railroad Commission v. Magnolia Petroleum Company, 130 Tex. 484, 109 S.W. 2d 967. That case refers to and quotes from the opinion in Railroad Commission v. Galveston Chamber of Commerce, 105 Tex. 101, 145 S.W. 573.

The same rule announced in the above cases was more recently stated by this Court in Railroad Commission v. Houston Natural Gas Corporation, 155 Tex. 502, 289 S.W. 2d 559, 573:

> "Earlier in this opinion we pointed out that where the attack upon a legislative act of the Railroad Commission is that it violates the Constitution because it

is confiscatory, we would not 'investigate the methods adopted by the Commission in fixing its rates, nor the motives or purposes which prompted such action.' **Railroad Commission v. Galveston Chamber of Commerce**, 105 Tex. 101, 145 S.W. 573, 580. The Commission may have used altogether erroneous methods and an erroneous conception of the law but if it arrived at a correct rate—and the court will test this rate against its own finding of fact—then the rate should be sustained."

The courts should simply test the validity of the order involved here on the basis of whether it is supported by substantial evidence. There is no logical reason why the Railroad Commission should be restrained from continuing in effect the allocation formula adopted August 18, 1958, for the Port Acres Field. I would affirm the judgment of the trial court.

Clyde E. Smith
Associate Justice

Opinion delivered: May 23, 1962

APPENDIX "C"

Opinion of Court of Civil Appeals in Halbouty v. Darsey

IN THE COURT OF CIVIL APPEALS,

Third Supreme Judicial District of Texas, at Austin

NO. 10,717

MICHEL T. HALBOUTY ET AL,
Appellants

vs.

W. G. DARSEY, JR. ET AL,
Appellees

From District Court of Travis County, 98th Judicial District, No. 112,863, Honorable Chas. O. Betts, Judge.

This is a Rule 37 case and is an appeal from a judgment sustaining an order of the Railroad Commission granting a permit to W. G. Darsey, Jr. for a well on his .48 acre tract in the Port Acres Field in Jefferson County.

The permit was granted December 22, 1958 "to prevent confiscation and or to prevent physical waste."

Appellant, Michel T. Halbouty, filed this suit against the Commission and Darsey to set aside the above order as being a discriminatory action by the Commission in which it acted arbitrarily, unjustly and unreasonably. He alleged that in addition to general rules of the Commission the following rule for the field became effective June 30, 1958:

"'Rule 1. No gas well shall hereafter be drilled nearer than thirteen hundred and twenty (1320) feet to any well completed in or drilling to the same reservoir on the same lease, unitized tract or farm, and no well shall be drilled nearer than three hundred and thirty (330) feet to any property line, lease line or subdivision line; provided, however, that the Commission will, in order to prevent waste or to prevent the confiscation of property grant exceptions to permit drilling within shorter distances than herein prescribed whenever the Commission shall have determined that such exception are necessary either to prevent waste or to prevent the confiscation of property. When exception to this rule is desired, application therefor shall be filed and will be acted upon in accordance with the provisions of Commission Statewide Rules 37 and 38, which applicable provisions of said rules are incorporated herein by reference.

"The aforementioned distances in the above rule are minimum distances to allow an operator flexibility in locating a well, and the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each one hundred and sixty (160) acre proration unit.

"In applying this rule the general order of the Commission with relation to the subdivision of property shall be observed.'

"The pertinent portion of Statewide Rule 37 reads as follows:

"'Section (a) . . . Such exception shall be granted only after at least ten (10) days notice to all adjacent lessees affected thereby has been given and after public hearing at which all interested parties may appear and be heard and after the Commission has determined that an exception to such rule is necessary either to

prevent waste or to protect property belonging to the applicant from confiscation.'"

Appellant further alleged:

"For the reason that the gas and distillate reserves underlying the small lease of W. G. Darsey, Jr. has a value of less than $20,000.00 and for the reason that the expense of drilling a well to produce such gas and distillate reserves would not be less than $250,000.00. For this reason, Permittee has no realizable property interest of any value in the gas and distillate underlying the above described lease and no confiscation of any property interest could result from the denial of his application for special permit to drill a well on said lease. On the other hand, the drilling of such a well and production of gas and distillate therefrom would result in the confiscation of gas and distillate reserves underlying Plaintiff's various leases in the field and that a large amount of gas and distillate produced from such well after the recovery of gas and distillate of the value of about $20,000.00 would be gas and distillate drained and confiscated from beneath the leases belonging to Plaintiff. No waste would or could result from denial of the above described application granted to Permittee on December 22, 1958."

He alleged an unconditional offer to pool the .48 acre tract with other acreage in the field, that the permit afforded Darsey a method to drain great quantities of plaintiff's gas and condensate and further that:

"The gas bearing sand in this area of the Port Acres Field is such that natural pressure causes the gas and condensate to move toward areas of lower or reduced pressure. When wells are drilled from the surface into the gas sand and produce, areas of reduced pressure

are created at the bottom of wells, and reservoir energy of the gas bearing sand drive the gas and condensate to the well bore and up through the well to the surface. The gas and condensate readily migrate through the sand from areas of higher pressure to areas of lowered pressure at the bottom of the well; across and without reference to the surface property lines. The drilling and operation of Permittee's No. 1 Lavely Unit will enable it to drain, produce and confiscate to the use of Permittee large quantities of gas from the lands of others, including Plaintiff, in said Port Acres Field. Said movement and drainage from properties toward the Permittee's No. 1 Lavely Unit of appreciable quantities of gas and condensate will reduce in a large and inestimable amount the quantity of gas and condensate which Plaintiff's wells would otherwise recover. The Plaintiff has drilled no well closer than 330 feet to lease lines and has unitized its leases when the acreage contained in individual leases was less than 160 acres in size to fulfill the Railroad Commission policy for this field that one well could drain 160 acres, therefore, the Permittee has obtained a great spacing and draining advantage over the Plaintiff. Under the laws of this State, Plaintiff has no legal recourse against Permittee for the value of the gas and condensate which the No. 1 Lavely Unit will cause to drain from Plaintiff's properties, and the granting of the permit to drill and operate said well is unreasonable and unjust in fact, and discriminatory in favor of Permittee as against Plaintiff, and does and will constitute an unlawful taking of Plaintiff's property for the benefit of Permittee, without compensation to Plaintiff, and said orders deny Plaintiff the equal protection of the law and deprive Plaintiff of his property without due process of law, in violation of the 14th Amendment of the Constitution of the United States and Section 19, Article I of the Constitution of Texas."

Appellant, Pan American Petroleum Corporation intervened in the cause. It alleged substantially the same facts alleged by Halbouty and further that there are 500 small tracts in the field which would be entitled to a well and that if permit is granted on each of such small tracts the orderly development of the field would be prevented, and that there is set for a hearing before the Commission an application for an amendment to the rules for the field, that the well location is in a residential area and that the drilling of the well and its production would create a hazard to life and to property.

Halbouty and Pan American are both owners and operators in the field. The .48 acre tract is not a voluntary subdivision and the permit in question is for the first well on the tract.

Special exceptions were sustained to the pleadings, appellants declined to amend and their causes were dismissed. Halbouty says these special exceptions were based on the proposition that the "permittee has a right as a matter of law to drill his first well." Under the facts here, or rather under the facts here alleged, this statement is substantially correct.

The briefs discuss the merits of the pleadings rather than the special exceptions and we will so direct our attention.

Appellants appear to say that the permit to drill the well on the .48 acre tract should be denied because: (1) the cost of drilling the well exceeds the value of the oil and gas under the tract; (2) if the well is drilled and produced there will be drainage from the surrounding tract; (3) there is an unconditional offer to pool the .48 acre tract with other tracts in the field; (4) there is set for hearing before the Commission an application to amend the rules for production and operation in the field; (5) the

granting of permits to drill on small tracts in the field will prevent its orderly development; (6) the drilling and production of the well, because of the location of the .48 acre tract, will create a hazard to life and to property, and (7) generally the Commission violated its discretion in granting the permit.

Admittedly the .48 acre tract is not an unlawful subdivision for which reason no issue of waste is here presented. Railroad Commission v. Delhi-Taylor Oil Corp., Tex. Civ. App., 302 S.W. 2d 273, Er. ref, n.r.e. Also the tract is not of such size and shape to meet the acreage and distance requirements of the spacing rule applicable to the field, however admittedly it meets the requirements for an exception under Statewide Rule 37a. As such it is entitled to a well. Kraker v. Railroad Commission, Tex. Civ. App., 188 S.W. 2d 912. Er. ref, w.o.m. Dailey v. Railroad Commission, Tex. Civ. App., 133 S.W. 2d 219. Er. ref. Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W. 2d 935, where Rule 37 and its exceptions were considered and also the rules of ownership, convenience and vested rights. Citation of additional authorities on this well settled question is not deemed necessary.

If appellees were denied a permit to drill on their .48 acre tract then clearly they would be denied the right to recover their fair share of the oil and gas in place under their land. The very purpose of Rule 37 by providing for exceptions, is to protect this right and it has been so declared. In Stanolind Oil & Gas Co. v. Railroad Commission, Tex. Civ. App., 96 S.W. 2d 664 this Court said:

> "Total deprivation of the landowner's vested right to a fair share of the recoverable oil in place under his land is not a proper remedy under our present conservation laws and rules promulgated thereunder."

The law recognizes the right of an owner to recover the oil and gas under his land as a vested right and one of which he cannot be deprived by the Commission. This being true the right is not to be denied because it appears to be uneconomical. This vested right to recover such oil and gas is to be considered in connection with the law of capture which is also recognized as a property right. Corzelius v. Harrell, 143 Tex. 509, 186 S.W. 2d 961, 964. Brown v. Humble Oil & Refining Co. supra. The probability that oil and gas from surrounding tracts would drain to the .48 acre tract could not be lawful reasons for denying the permit because such fact is only a part of the law of capture.

The unconditional offer to pool the .48 acre tract with surrounding tracts in the field can in no event defeat the permit under the facts here. This is not a matter over which the Commission has been given jurisdiction to require but is a subject for voluntary agreement. Dailey v. Railroad Commission supra.

The facts are to be considered as of the time the Commission acted and the fact that there is now, or at the time of trial there was, an application pending before the Commission to amend the rules applicable to the field would in no event govern the Commission's action. Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73, 82.

The orderly development of oil and gas fields and the production of oil and gas from such fields are matters vested in the Commission. For these purposes the Legislature has vested it with authority to make rules. It has promulgated rules for this purpose and the special permit here was granted by authority of the Commission's rule. See: Gulf Land. Co. v. Atlantic Refining Co. supra. Moreover

to now say that small tracts in the field are not entitled to be drilled under rules of the Commission would be to deny them the right of separate development even though it may result in densely drilled areas. Kraker v. Railroad Commission supra.

The fact that the drilling and production of the well on the .48 acre tract, because of the location of the tract, may create a hazard to life and to property would not violate the rule under which the permit was granted and the Commission could not refuse to apply the rule, exception, under a state of facts that would destroy such rule. Dailey v. Railroad Commission supra.

It may be said generally that the Commission is vested with authority and charged with the duty of conserving oil and gas and that in doing so it is its duty to see that oil and gas fields are drilled and produced in an orderly and scientific manner. However in so doing it cannot violate vested rights. We deem it not necessary to cite authorities in addition to those supra for this statement: The Commission has discretion in the exercise of the powers committed to its jurisdiction but no appellate court decision of this State has extended the exercise of this discretion to the denial of vested rights. We have not been cited to any authority, and we know of none, that would authorize the Commission to deny appellee a permit to drill a first well on his .48 acre tract and thereby, in effect, confiscate his property to the use and benefit of surrounding tracts with or without compensation. Particularly applicable to the argument of appellants is the statement of the court in Stanolind Oil & Gas Co. v. Railroad Commission, supra that:

"Exceptions to the rule, granted to protect vested rights, for which the rule expressly provides, presuppose some resultant waste, or other detriment. The inherent right of the landowner to obtain his fair share of the oil in place under his land is the basic consideration for the exception to the rule 'to protect vested rights,' which is deemed to outweigh other considerations for which the rule was promulgated. The commission has ample power to pass such rules or orders as may be necessary to minimize the deleterious effects flowing from exceptions to the rule."

The judgment of the trial court is affirmed.

Raymond Gray
Associate Justice

Affirmed
Filed: July 15, 1959.

APPENDIX "D"

Assignments 12-17 in Amended Motion for Rehearing

12.

The Court erred in reversing the judgment of the District Court and in rendering judgment for appellants and in not remanding the cause to the District Court for a new trial, because the Supreme Court has held offers of appellants to pool or unitize with appellees are relevant and material, and the appellees were not given a chance to controvert the evidence pertaining to the matter of offers to pool and unitize and such issue was not fully developed at the trial in the District Court, because the trial court deemed such evidence immaterial, and in the interest of justice the cause should be remanded for a retrial, and due process of law under the Fourteenth Amendment to the United States Constitution requires that appellees have the opportunity to present their evidence on issues not fully developed by the evidence at the trial.

13.

The Court erred in reversing the judgment of the District Court and rendering judgment for appellants and in not remanding the cause for a new trial, because if the appellees' right to an allowable sufficient to pay back drilling and operating costs plus a reasonable profit depends upon the existence of fair offers to pool or unitize appellees' tracts with other tracts, appellees are entitled to a judicial determination of the existence and fairness of such offers, and appellees by the Court's judgment are denied

such judicial determination of such issue, and such judgment is a denial to appellees of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

14.

The Court erred in holding that the right of appellees to an allowable which would permit them to recover their costs plus a reasonable profit is dependent upon the existence or non-existence of an offer to pool or unitize their tracts, because there is no procedure provided by statute or otherwise for a determination of the issue of pooling or unitization or the fairness of any offers to pool or unitize, and in the absence of any such procedure or any lawful standards for determining such issues, appellees are denied due process of law in violation of their rights under the Fourteenth Amendment to the Constitution of the United States.

15.

The Court erred in substituting its judgment for the judgment of the District Court, upholding the order of the Railroad Commission, upon issues which involve the judgment and discretion of the Railroad Commission in determining the weight to be given to various factors in the allocation formula, including the per well factor, because the effect of such judgment is to confiscate appellees' property and destroy their investments without a proper judicial determination of the issue of confiscation and to deny to appellees their rights under the Fourteenth Amendment to the United States Constitution.

16.

The Court erred in reversing the judgment of the District Court and in rendering judgment for appellants, because the Court's judgment has the effect of destroying the value of permits lawfully granted to appellees by the Railroad Commission under statutory authority to drill wells on their tracts and would deny to appellees the right to recover more than a small part of their investment costs in drilling and operating their wells and would prevent any return on appellees' investments, and such judgment results in the confiscation of appellees' property and denies them due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

17.

The Court erred in holding that the Railroad Commission in exercising the police power of the State under the conservation statutes is required to reduce the allowable of the appellees' wells so as to deny appellees any return on their investment and so as to make it impossible for appellees to recover their drilling and operating costs or any profit, and such holding constitutes and results in a confiscation of the property of appellees in violation of the Fourteenth Amendment to the United States Constitution.

APPENDIX "E"

Constitutional Provisions, Statutes and Administrative Order Involved

The constitutional provision involved is the second sentence of Section 1 of the Fourteenth Amendment to the United States Constitution, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes involved are Articles 6008, 6008b, and 6014, Vernon's Texas Civil Statutes, the pertinent sections being as follows:

Article 6008:

> "Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests:
>
> "(a) In the prevention of waste as 'waste' is defined herein;
>
> "(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article."
>
> "Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the

evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article."

"Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The Commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the

reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month. As amended Acts 1947, 50th Leg., p. 1059, ch. 453, s. 1."

"Sec. 13. In determining the daily allowable production for each gas well the Commission shall take into account the size of the tract segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; and all other factors which are pertinent; provided that the Commission shall not take into account the size of the tract upon which any gas well or wells are located in excess of the efficient drainage area of such well or wells, producing at twenty-five per cent (25%) of the daily productive capacity, which drainage area shall be determined by the Commission. In ascertaining the drainage area of a well, the Commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well."

Article 6008b:

"Section 1. Subject to approval of the Railroad Commission of Texas (hereinafter called Commission),

as hereinafter set out, persons owning or controlling production, leases, royalties, or other interests in separate properties in the same oil field, gas field, or oil and gas field, may voluntarily enter into and perform agreements for the following purposes:

"(A) To establish pooled units necessary to effect secondary recovery operations for oil or gas, including those known as cycling, recycling, repressuring, water flooding, and pressure maintenance and to establish and operate cooperative facilities necessary for said secondary recovery operations;

"(B) To establish pooled units and cooperative facilities necessary for the conservation and utilization of gas, including those for extracting and separating the hydrocarbons from the natural gas or casinghead gas and returning the dry gas to a formation underlying any lands or leases committed to the agreement.

"Such agreements shall not become lawful nor effective until the Commission finds, after application, notice and hearing:

"1. Such agreement is necessary to accomplish the purposes specified in (A) or (B) or both; that it is in the interest of the public welfare as being reasonably necessary to prevent waste, and to promote the conservation of oil or gas or both; and that the rights of the owners of all the interests in the field, whether signers of the unit agreement or not, would be protected under its operation;

"2. The estimated additional cost, if any, of conducting such operation will not exceed the value of additional oil and gas so recovered, by or on behalf of the several persons affected, including royalty owners, owners of overriding royalties, oil and gas payments, carried interests, lien claimants and others as well as the lessees;

"3. Other available or existing methods or facilities for secondary recovery operations and/or for the conservation and utilization of gas in the particular area or field concerned are inadequate for such purposes;

"4. The area covered by the suit agreement contains only such part of the field as has reasonably been defined by development, and that the owners of interests in the oil and gas under each tract of land within the area reasonably defined by development are given an opportunity to enter into such unit upon the same yardstick basis as the owners of interests in the oil and gas under the other tracts in the unit.

"Such agreements may provide for the location and spacing of input wells and for the extension of leases covering any part of lands committed to the unit so long as operations for drilling or reworking are conducted on the unit or so long as production of oil or gas in paying quantities is had from any part of the lands or leases committed thereto; provided that no such agreement shall relieve any operator from the obligation to develop reasonably the lands and leases as a whole committed thereto.

"Such agreements shall not bind any land owner, royalty owner, lessor, lessee, overriding royalty owner or any other person who does not execute them, but shall bind only the persons who execute them, their heirs, successors, assigns and legal representatives; but no person shall be compelled or required to enter into such an agreement."

Article 6014:

"The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and

is prohibited. The term 'waste' among other things shall specifically include:

"(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership."

The Railroad Commission order involved is Rule 3 of Oil and Gas Docket No. 128, #3-38,395, dated August 18, 1958, entitled "Special Order Adopting Rules and Regulations for the Port Acres (Lower Hackberry) Field, Jefferson County, Texas," as follows:

"RULE 3. The daily allowable production of gas from individual wells completed in a non-associated gas reservoir of the subject field shall be determined by allocating the allowable production, after deductions have been made for wells which are incapable of producing their gas allowables, among the individual wells in the following manner:

"(a) Two-thirds (2/3) of the allowed gas production from a non-associated gas reservoir shall be allocated to the individual wells completed therein in that proportion that the acreage assigned to each such well bears to the sum of the acreage in the reservoir.

"(b) One-third (1/3) of the allowed gas production from a non-associated gas reservoir shall be allocated equally among the individual wells completed therein.

"(c) The total daily non-associated gas allowable for each well shall be the sum of its acreage and per well allowables."

APPENDIX "F"

Judgment of 98th District Court, Travis County, Texas

NO. 115,096

MICHEL T. HALBOUTY, et al.,	§	In the 98th
vs.	§	District Court
RAILROAD COMMISSION	§	of Travis County,
OF TEXAS, et al.,	§	Texas.

JUDGMENT

On the 17th day of October, 1960, came on to be heard the above entitled and numbered cause, wherein Michel T. Halbouty, Meredith & Company, and Pan American Petroleum Corporation are plaintiffs, and the Railroad Commission of Texas and the members thereof, Ernest O. Thompson, Olin Culberson, and William J. Murray, Jr., are defendants, and Peter Henderson Oil Company, H. L. Dillon, Jr., Roger L. Bauman, J. H. Cordell, John Hill, John Marshall, John W. Pace, Gray Oil Company, J. C. Barnes, Tyrrell-Combest Realty Company, P. G. Lake, Inc., Lake Production Company, and Z. J. Spruiell are intervenors, and thereupon all parties, by their respective attorneys, announced ready for trial and all parties submitted the case to the court without intervention of a jury, and the defendants, the Railroad Commission of Texas, et al., and the intervenors, H. L. Dillon, Jr., et al., J. C. Barnes, Tyrrell-Combest Realty Company, and P. G. Lake, Inc., et al., thereupon presented to the court their special exceptions contained in their respective petitions in intervention, directed to the allegations contained in the first amended

original petition of the plaintiffs, Michel T. Halbouty, et al., and the second amended petition in intervention of Peter Henderson Oil Company, and the court, having heard argument upon said special exceptions by counsel for plaintiffs, defendants, and all intervenors, was of the opinion that said special exceptions, in so far as they are directed against allegations in the pleadings of the plaintiffs and the said intervenor, Peter Henderson Oil Company, as to the failure and refusal of the Railroad Commission to enter compulsory cycling orders or compulsory pressure maintenance orders in the Port Acres (Lower Hackberry) Field should be sustained, and the court thereupon sustained the special exceptions contained in the second amended original answer of defendants, the Railroad Commission of Texas, et al., in paragraphs 1, 6, 8, and 9 of said answer, and the special exceptions contained in paragraphs 2, 7, and 10 in the first amended petition in intervention of intervenors, H. L. Dillon, Jr., et al., and the special exceptions contained in paragraphs 16a, 16b, and 16c, as contained in the second trial amendment of the said intervenors, H. L. Dillon, Jr., et al., and the special exception contained in paragraph 3 of the first amended petition in intervention of J. C. Barnes, and the special exception contained in paragraph II (2) of the petition in intervention of Tyrrell-Combest Realty Company, and the special exceptions contained in paragraphs 3, 8, 10, and 11 in the petition in intervention of P. O. Lake, Inc., et al., in so far as said special exceptions related to allegations contained in the pleadings of the said plaintiffs and the said intervenor, Peter Henderson Oil Company, relating to the failure and refusal of the Railroad Commission of Texas to enter orders for compulsory cycling and compulsory pressure maintenance

in the Port Acres (Lower Hackberry) Field, to which action of the court the plaintiffs and the said intervenor, Peter Henderson Oil Company, in open court duly excepted; and the court then advised counsel that all other special exceptions contained in the pleadings of the defendants and the said intervenors, H. L. Dillon, Jr., et al., J. C. Barnes, Tyrrell-Combest Realty Company, and P. G. Lake, Inc., et al., would be held under advisement by the court; and the court thereupon proceeded to hear evidence offered by all parties on October 17, 18, 19, 20, 24, 25, 26, 27 and 31, and November 1, 2, and 3, 1960, whereupon all parties announced that they had closed their evidence, and the court on November 7, 1960, heard argument of counsel for all parties, and after having duly considered said argument, the court is of the opinion that all special exceptions contained in the second amended original answer of the defendants, the Railroad Commission of Texas, et al., the first amended petition in intervention of intervenors, H. L. Dillon, Jr., et al., and the first and second trial amendments of intervenors, H. L. Dillon, Jr., et al., the petition in intervention of Tyrrell-Combest Realty Company, the first amended petition in intervention of J. C. Barnes, and the petition in intervention of P. G. Lake, Inc., et al., except as they have been sustained by the court as hereinbefore recited, should be and the same are overruled; and having further duly considered the pleadings, the evidence, and the arguments of counsel for all parties, the court is of the opinion and finds and concludes that the orders of the Railroad Commission of Texas complained of herein by the plaintiffs and the intervenor, Peter Henderson Oil Company, are reasonably sustained by substantial evidence heard by this court in the trial of this

cause and that said orders of the Railroad Commission are lawful and valid orders.

It is therefore ORDERED, ADJUDGED and DECREED by the court that the permanent injunctions and all other relief prayed for by the plaintiffs and the intervenor, Peter Henderson Oil Company, be and the same is hereby denied and refused, and that the defendants, and the intervenors, H. L. Dillon, Jr., et al., J. C. Barnes, Tyrrell-Combest Realty Company, and P. G. Lake, Inc., et al., recover of and from the plaintiffs and the intervenor Peter Henderson Oil Company, their costs, for which execution may issue.

It is further ORDERED, ADJUDGED and DECREED by the court that all relief prayed for herein by any party which is not herein granted is hereby refused and denied.

To which judgment, action and order of the Court the plaintiffs, Michel T. Halbouty, Meredith & Company and Pan American Petroleum Corporation, and intervenor, Peter Henderson Oil Company, in open court duly excepted.

Rendered, signed and entered this 23rd day of November, 1960.

/Sgd/ D. B. WOOD

Judge Presiding
98th District Court
Travis County, Texas

APPROVED AS TO FORM:

/s/ Andrews Kurth Campbell & Jones
By Harry R. Jones
Attorney for Plaintiffs, Michel T. Halbouty, and Meredith & Company

/s/ Butler, Binion, Rice & Cook
By Cecil N. Cook
By James D. Smullen
Attorney for Intervenor, Peter Henderson Oil Company.

/s/ Houghton Brownlee, Jr.
Attorney for Defendants, the Railroad Commission of Texas, et al.

/s/ Jack Blalock
James P. Hart
Attorney for Intervenors, H. L. Dillon, Jr., et al.

/s/ Wallace H. Scott, Jr.
Attorney for Intervenor, J. C. Barnes.

/s/ John J. McKay
Attorney for Intervenor, Tyrrell-Combest Realty Company.

/s/ James N. Ludlum
Attorney for Intervenors, P. G. Lake, Inc., et al.

TURNER, RODGERS, WINN, SCURLOCK & TERRY
By /s/ Frank J. Scurlock
Attorney for Plaintiff, Pan American Petroleum Corporation

APPENDIX "G"

Judgment of the Supreme Court of Texas

NO. A-8200

February 14, 1962

MICHEL T. HALBOUTY, et al.,	§	Direct Appeal
vs	§	from the 98th
RAILROAD COMMISSION OF TEXAS, et al.,	§	District Court of
	§	Travis County.

This cause came on to be heard on direct appeal from the 98th District Court of Travis County, Texas, and the original transcript and briefs and argument of counsel having been duly considered, because it is the opinion of the Court that in so far as this appeal involves the question of the refusal of the Railroad Commission of Texas to require compulsory cycling and pressure maintenance in the Port Acres Field this Court has no jurisdiction, and in that respect it is *adjudged, ordered* and *decreed* that this appeal be, and hereby is, dismissed.

"Because it is further the opinion of the Court (Associate Justice Griffith dissenting) that there was error in the judgment of the District Court in so far as it denied the injunction to restrain the Railroad Commission from continuing in effect the allocation formula, being Rule 3 of the "Special Order Adopting Rules and Regulations for the Port Acres Field," No. 3-38395, dated August 18, 1938, as prayed for by plaintiffs and the intervenor, Peter Henderson Oil Company, it is *adjudged, ordered* and *decreed* that said judgment, in that respect, be, and is hereby, reversed and set aside.

"And this Court proceeding to render judgment in that respect as should have been rendered below, it is *considered, adjudged, ordered* and *decreed* that Rule 3 of the "Special Order Adopting Rules and Regulations for the Port Acres Field", No. 3-38395, entered by the Railroad Commission of Texas, was not supported by substantial evidence and, therefore, is invalid and of no force and effect, and that the Railroad Commission of Texas, its members and their successors, agents and representatives, and each of them, be, and they are hereby, restrained and enjoined from enforcing Rule 3 of said "Special Order Adopting Rules and Regulations for the Port Acres Field", No. 3-38395, in accordance with the opinion herein this day delivered.

"It is further ordered that the appellees (defendants and defendant-intervenors), Railroad Commission of Texas, H. L. Dillon, Jr., Roger L. Baumann, J. H. Cordell, John Hill, John Marshall, John W. Pace, and Gray Oil Company, a partnership composed of E. J. Gray and Eddie V. Gray, J. C. Barnes, Tyrell-Combest Realty Company, P. G. Lake, Inc., Lake Production Corporation and Z. J. Spruiell, jointly and severally, pay all costs in this cause expended and incurred in this Court and the District Court; that appellants (plaintiffs and plaintiff-intervenor), Michel T. Halbouty, Meredith & Company, Pan American Petroleum Corporation and Peter Henderson Oil Company, have and recover of and from the above named appellees, Railroad Commission of Texas et al., the costs by them expended and incurred in said courts, and that this decision, with a copy of the opinion, be certified to the District Court of Travis County, Texas, for observance."

APPENDIX "H"

Order of the Supreme Court of Texas Overruling Motions for Rehearing

IN THE SUPREME COURT OF TEXAS

NO. A-8200

May 23, 1962.

MICHEL T. HALBOUTY, et al.,	§	Direct Appeal
vs.	§	from the 98th
RAILROAD COMMISSION	§	District Court of
OF TEXAS, et al.,	§	Travis County.

Motion for rehearing on behalf of the Railroad Commission of Texas and motion for rehearing on behalf of H. L. Dillon et al., filed herein on March 1, 1962, as well as motion of R. L. Dillon et al. to amend their motion for rehearing, filed herein on March 16, 1962, having been duly considered by the Court, it is ordered that the motion of H. L. Dillon et al. to amend their motion for rehearing be, and hereby is, granted, and that the motion for rehearing of the Railroad Commission of Texas and the motion for rehearing of H. L. Dillon et al. as amended, be and hereby are, overruled.

(Dissenting opinion on Motion for Rehearing by Clyde E. Smith, Associate Justice).